TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 342

BLAZEY CZAPLICKI, PETITIONER,

vs.

THE VESSEL "SS HOEGH SILVERCLOUD" HER BOILERS, ENGINES, TACKLE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

SUPREME COURT OF THE UNITED STATES

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 173-113

BLAZEY CZAPLICKI, Libelant,

vs.

SS. HOEGH SILVERCLOUD, Her Boilers, etc., and OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business Under the Name and Style of Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

Trial Record of Proceedings of April 20, 1954

Before Hon. Sylvester J. Ryan, District Judge

New York, April 20, 1954;
10:30 o'clock a. m.

APPEARANCES

Nathan Baker, Esq., Proctor for Libelant.

Galli & Locker, Esqs., Proctors for Hamilton Marine Contracting Company; Ralph H. Terhune, Esq., of Counsel.

[fol. 3] Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of Norwegian Shipping and Trade Mission; Francis X. Byrn, Esq., of Counsel.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Are all sides ready?

Mr. Baker: Yes, sir.

The Court: I have examined the pleadings in this case and the record in this case, and I think that before we try the issue of negligence we should first inquire into the suf-

ficiency and have a preliminary hearing on the sufficiency of the fifth separate and complete defense pleaded by Hamilton Marine Contracting Company. That same defense has also been interposed by the Norwegian Shipping and Trade Mission.

Mr. Baker: And by Kerr Steamship Company.

The Court: And by Kerr Steamship Company, the agent.

Is there any difference of opinion, gentlemen, with reference to the method of procedure that I have suggested?

Mr. Terhune: I have none.

The Court: Now, Mr. Baker, the separate defense pleaded [fol. 4] by Hamilton Marine Contracting Company is essentially the same defense that has been pleaded by Norwegian Shipping and Trade Mission and was pleaded by the Kerr Steamship Company.; is that correct?

Mr. Baker: It is the same defense. In other words, they have set up there that by reason of the formal award in the Compensation Commission there has been an assignment of the cause of action to the employer or the Travelers Insurance Company, the insurance carrier for the employer.

The Court: Now, do you admit the allegations of this defense as it has been pleaded, or do you dispute those allegations?

Specifically does the libelant admit that at the time and place set forth in the libel the libelant was engaged in a maritime employment and was the employee of the Northern Dock Company, Inc., within the meaning of the Longshoremen's and Harbor Workers Compensation Act, Title 33, U. S. C., Sections 901 et seq.?

Mr. Baker: We admit that.

The Court: Do you admit that the employer, the Northern Dock Company, had prior to the time of the alleged accident and prior to September 6, 1945 duly complied with the provisions of the Act and secured compensation insur- [fol. 5] ance protecting the libelant as an employee?

Mr. Baker: We admit that.

The Court: Do you admit that subsequent to the happening of the accident pleaded in the libel the libelant duly filed a claim for compensation with the United States Employee's Compensation Commission?

Mr. Baker: We admit that.

The Court: Do you admit that thereafter and on September 28, 1945, the Deputy Commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the Compensation Act?

Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel.

Mr. Terhune: As to that, if your Honor please, all that I can admit is that according to the record of the United States Employee's Compensation Commission, at the time the libelant hear-in accepted the compensation, he was not represented by counsel but appeared personally and was [fol. 6] advised of his rights on the 27th of September, 1945, according to the file of the Commission, by Mr. D. B. O'Keefe, and thereafter filed his claim, and a formal order was issued.

And as to that I would ask your Honor to receive in evidence the forms and data contained in the file; that is, the employee's claim for compensation dated September 27, 1945—I assume it was intended to be although they have not inserted the "5" after the "4."

Also Mr. O'Keefe, the claims examiner for the Commission's memorandum for the file, and the order and award of September 28, 1945.

The Court: We will receive those in evidence and we will mark them as Libelant's exhibits. Do you object to them being received as libelant's exhibits?

Mr. Baker: No objection.

Will counsel still admit that there was no hearing? In the award it says, "No hearing."

Mr. Terhune: Apparently that is correct. The man was not represented by any attorney nor was any hearing held. An order was entered on his own application.

The Court: Let us specify now what papers we are receiving as libelant's exhibits. Put them on the record.

[fol. 7] Mr. Terhune: The employee's claim for compensation.

The Court: That is Libelant's Exhibit No. 1.

(Marked Libelant's Exhibit 1.)

Mr. Baker: I don't know if I can stipulate to this one, your Honor.

The Court: Just tell me what papers you are putting in evidence. That is all I want to know. What is the second paper you are putting in evidence?

Mr. Baker: I can't put this in evidence, your Honor.

Mr. Terhune: I ask that it be marked for identification.

The Court: That will be marked Respondent Hamilton's Exhibit A for identification.

(Marked Respondent Hamilton's Exhibit A for identification.)

The Court: And that is what?

Mr. Terhune: That is a memorandum for the file, contained in the file of the Commission, apparently dictated by D. B. O'Keefe, claims examiner, and I would like to read it into the record as well, if I may.

The Court: We are going to have it marked.

[fol. 8] Do you want to offer it in evidence as your exhibit?

Mr. Terhune: I will offer it as a respondent's exhibit.

The Court: And as part of the official records of the Compensation Commission?

Mr. Terhune: Of the Commission, yes.

The Court: Is there any objection?

Mr. Baker: Well, I object on the ground that I think Mr. O'Keefe, who is still with the Commission, should be produced.

Mr. Terhune: Well, he is available, as I understand it, and subject to a telephone call if needed.

Mr. Baker: I don't see how I can stipulate——

The Court: I will receive it as part of the official records of the Compensation Commission. That does not preclude either side from calling him. That will be Respondent's Exhibit A in evidence.

(Respondent Hamilton's Exhibit A for identification received in evidence.)

The Court: What other papers does libelant desire to have marked in evidence?

Mr. Baker: Compensation order, award of compensation.

The Court: That will be marked Libelant's Exhibit 2.

[fol. 9] Mr. Terhune: With proof of service.

Mr. Baker: Yes.

The Court: It will be received.

(Marked Libelant's Exhibit 2.)

The Court: Does libelant desire to offer any other papers in evidence?

Mr. Baker: Will your Honor give me a moment to look through this record?

(Short pause.)

Mr. Baker: I would like to offer in evidence the first report of the employer, Northern Dock Company, dated September 6, 1945.

Mr. Terhune: No objection.

(Marked Libelant's Exhibit 3.)

Mr. Baker: I offer in evidence the claim of the Travelers Insurance Company that the claim will be controverted, dated September 17, 1945.

Mr. Terhune: Well, I think that counsel has miscalled the document, but I have no objection to the document being received.

It is called at the top, a notice that the claim will -- controverted, but when the Court examines it under Section D it appears, "Injured is undecided whether or not to sue the third party."

The Court: It will be received.

[fol. 10] (Marked Libelant's Exhibit 4.)

Mr. Baker: I offer in evidence this letter of D. B. O'Keefe, claims examiner, dated September 28, 1945, addressed to the Travelers Insurance Company.

Mr. Terhune: No objection.

The Court: It will be received in evidence.

(Marked Libelant's Exhibit 5.)

Mr. Baker: I would like to call the Court's attention to the fact that that appears to be the same date that the formal award of compensation was entered.

I offer in evidence this letter from the Compensation Commission dated December 5, 1945, together with the writing thereon.

The Court: A letter addressed to whom?

Mr. Baker: Addressed to Czaplicki by Mr. O'Keefe, claims examiner.

Mr. Terhune: I have no objection to that.

(Marked Libelant's Exhibit 6.)

Mr. Baker: That is all.

The Court: Is that all?

Mr. Baker: That is all on this compensation record.

The Court: Is it stipulated that the libelant's employer, the Northern Dock Company, and the insurance company, Travelers Insurance Company, paid to the libelant as com-
[fol. 11] pensation under the award of September 28, 1945, compensation for two weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of $45, and continued thereafter to make by-weekly installment payments of $22.50 per week until the disability ceased?

Mr. Baker: It is stipulated that payments were made under that order and award, and according to the record it would indicate they made payments of temporary total disability I think for seven weeks.

The Court: That they did pay for seven weeks and that the libelant received seven weeks' disability under the award; is that conceded?

Mr. Baker: That they paid a total of seven weeks and one day temporary total disability or $160.72.

The Court: Under the award?

Mr. Baker: Yes, under the award.

The Court: Has the libelant any proof of any fraud that it desires to submit to the Court?

Mr. Terhune: I object to such proof——

The Court: I just want to inquire and then I will hear your objection if an offer is made.

[fol. 12] Mr. Baker: We have no such evidence at this time, your Honor.

The Court: Have you any further evidence on the issue raised by this defense?

Mr. Baker: I would like to have counsel stipulate that the third party defendant, the Hamilton Marine Contracting Company, which is being sued in this case, is insured by the Travelers Insurance Company, which is the same insurance carrier who insured the employer, the Northern Dock Company.

The Court: In view of your statement that you desire to submit no proof of fraud I do not see how such a concession would be relevant.

Mr. Baker: Would counsel concede it for the record so that it could be passed upon, if necessary, by a higher court?

The Court: What could be passed upon?

Mr. Baker: I would like to have that in the record, your Honor, for the purposes of a possible appeal in this case.

Mr. Terhune: I will state that my position is that it is wholly irrelevant in this action, without either admitting or denying the truth of the facts——

Mr. Baker: It is conceded?

Mr. Terhune: No, I cannot make that concession on this [fol. 13] record. I don't think it has any place in it.

The Court: Has the libelant any further proof?

Mr. Baker: I offer in evidence the deposition of the Travelers Insurance Company which was taken June 25, 1953.

Mr. Terhune: I object to it.

Mr. Baker: Does your Honor have the original in the file?

Mr. Terhune: I shall object to it upon the ground that it is neither relevant or competent to the issue in this case.

The Court: Do you object to its competency as to the regularity in which it was taken?

Mr. Terhune: Not at all.

The Court: You simply object to it as being irrelevant?

Mr. Terhune: Irrelevant.

The Court: And immaterial?

Mr. Terhune: That is correct.

The Court: I am going to take it. I feel that it is irrelevant and immaterial in view of the statement of counsel that

he makes no charge of fraud on behalf of the libelant concerning the award of compensation, but I will take it so [fol. 14] that there might be a complete record.

Mr. Terhune: Surely.

The Court: And the objection is overruled.

(Marked Libelant's Exhibit 7.)

Mr. Baker: If counsel will not admit that——

The Court: I have received it in evidence.

Mr. Baker: If counsel will not admit that the Travelers Insurance Company also is the insurance carrier for the Hamilton Marine Contracting Company, I don't like to do this, but if there is a representative of the Travelers Insurance Company here, I can call him.

The Court: Perhaps they will stipulate that if someone were called he would so testify.

Mr. Terhune: It is a true fact, as I indicated to your Honor before, but I do not concede——

The Court: You say it is immaterial and irrelevant?

Mr. Terhune: That is correct.

The Court: But if I rule that it is material and relevant or that I will take it irrespective of its relevancy or materiality, you will concede that to be the fact?

Mr. Terhune: Oh, to the truth, sir, no question about that. [fol. 15] The Court: And I will take notice of that and make that concession part of the record, with the understanding that the respondent objected to it as being immaterial and irrelevant.

I personally also feel, in view of libelant's position that no charge of fraud is made here in connection with the award that it is immaterial and irrelevant, but I will take it so that the record may be complete.

Mr. Baker: At this time, if your Honor please, I had planned to subpoena the file of the Northern Dock Company or the Travelers Insurance Company, who were the insurance carrier for Northern Dock Company so that I could examine it and then offer into evidence such documents as I deem pertinent to this hearing.

The Court: This is a trial.

Mr. Baker: Yes.

The Court: We are trying this libel preliminary to the

trial of the allegations of negligence. I felt that in view of the prior decisions which have been made in this case by my brother judges that I should first inquire into the sufficiency of the separate defenses that have been pleaded.

What is the purpose of getting the file of the Travelers Insurance Company and offering a lot of papers? On what [fol. 16] issue do you desire to offer them?

Mr. Baker: On the issue as to when they first received notice that they were the same insurance carriers, both for the compensation carrier and the Hamilton Marine Contracting Company.

The Court: I assume that they received notice at the time they wrote the policies and both the policies were written prior to the accident on which this libel is based.

Mr. Baker: Unless counsel is ready to admit as to when the Northern Dock Company, or when the Travelers Insurance Company on the claim of the Hamilton Marine first had notice——

The Court: I understand that his concession is that prior to the accident upon which this claim is based the Travelers were the insurers of both risks.

Mr. Baker: All right, that will be all.

The Court: Libelant has no further proof to offer?

Mr. Baker: On this——

The Court: On the special trial which we are conducting first of the issues raised by the separate defense.

Mr. Baker: That is all on that issue.

The Court: All right. Have the respondents any addi- [fol. 17] tional proof they desire to submit in connection with this trial of the special issue raised by the separate defense?

Mr. Terhune: No, if your Honor please. The respondents will rest on that issue and move for judgment dismissing the libel on that issue.

The Court: The respondent Hamilton Marine Contracting Company?

Mr. Terhune: That is correct.

The Court: How about the other respondent, the Norwegian Shipping and Trade Mission?

Mr. Byrn: I would like to make a statement on the record. We represented originally two respondents, the Kerr

Steamship Company, which libel has been dismissed as to Kerr Steamship Company in an opinion by Judge Sugarman, and a similar motion made in behalf of the Norwegian Shipping and Trade Mission, and that was also referred to Judge Sugarman, and it was stipulated between Mr. Baker and ourselves that that motion will be held in abeyance pending an appeal that Mr. Baker has taken from the dismissal as against Kerr Steamship Company.

The Court: There can be no appeal heard until all the issues in the case have been disposed of. My specific question now is, do you desire to present any evidence in support [fol. 18] of the separate defense that you have presented?

Mr. Byrn: Well, that stipulation had existed up until this morning. This morning I said that we would renew our motion in behalf of the Norwegian Shipping and Trade Mission.

The Court: You now renew your motion to dismiss?

Mr. Byrn: I renew my motion and I would also like to make another statement as to the negligence aspect of this case.

The Court: I am not trying that issue at this time. I am first trying as a special issue the question raised by the defense.

Mr. Byrn: But I would like to remove myself from that other issue, your Honor, because that was the agreement that I had with Mr. Baker, that we would not participate in the trial of that.

The Court: I am not trying that at this point. We will reach that point in a few moments. If I sustain this defense that will dispose of the libel.

Mr. Byrn: May I say that our objection was taken by exceptions and not by——

The Court: By exceptive allegations?

Mr. Byrn: Yes, sir.

The Court: And the Hamilton Marine Contracting Com- [fol. 19] pany took their objections by way of defense in their answer?

Mr. Terhune: That is right, sir.

The Court: And all rest then on the special issue raised by this defense; is that correct, gentlemen?

Mr. Terhune: That is correct.

ORAL OPINION

The Court: I find that the law of this case has been settled by the opinion of my brother judges. Judge Sugarman, by his decision rendered on December 11, 1952, sustained the exceptions and exceptive allegations of the respondent Kerr Steamship Company to the libel filed herein upon the same grounds as are pleaded in the second defense of Hamilton Marine Contracting Company and pleaded in the exceptive allegations of the Norwegian Shipping and Trade Mission.

The law on the case has also been set by a decision of my brother Judge Goddard, rendered on November 30, 1953 when he denied a motion made by the libelant herein to strike this separate defense from the answer of Hamilton Marine Contracting Company, Inc.

I find, therefore, that this libel must be dismissed on the conceded facts here and on the law of the case as it has been established by my brother judges, and I therefore hold that the separate defense of Hamilton Marine Contracting Company, Inc., must be sustained, and that the exceptions and [fol. 20] exceptive allegations of the respondent Norwegian Shipping and Trade Mission must be sustained, and conclude that the libelant is barred by having elected and received a formal compensation award and benefits under Title 33, U. S. Code, Sections 901 et seq., and the libel is therefore dismissed without costs as to these two remaining respondents, Norwegian Shipping and Trade Mission and Hamilton Marine Contracting Company, Inc.

An appropriate decree may be submitted.

All right, gentlemen.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 21] [File endorsement omitted]

IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Libel and Complaint of BLAZEY CZAPLICKI

against

The Vessel, "SS. HOEGH SILVERCLOUD", Her Boilers, Engines, Tackle, Apparel and Furniture and Against All Persons Claiming Any Interest Therein, and Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc. and Hamilton Marine Contracting Company, Inc., in a Cause of Action in Tort for Damages for Personal Injuries, Civil and Maritime, Alleges as Follows:

LIBEL BY SEAMAN UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SURETY PREPAYMENT OF COSTS OF FEES FOR ENFORCEMENT OF THE LAWS OF THE UNITED STATES, PROTECTION OF HEALTH AND SAFETY AT SEA—Filed June 12, 1952

First Cause of Action

First: Libelant, Blazey Czaplicki, is a resident of the City of Jersey City, County of Hudson and State of New Jersey, and is a citizen of the State of New Jersey, and of the United States of America.

[fol. 22] Second: The respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, was and still is a citizen of Norway, having an office and place of business in the Borough of Manhattan, City, County and State of New York.

Third: The respondent, Kerr Steamship Company, Inc., was and still is a corporation with an office and place of business in the Borough of Manhattan, City, County and State of New York.

Fourth: The respondent, Hamilton Marine Contracting Company Inc. was and still is a corporation with an office

and place of business in the Borough of Brooklyn, County of Kings, City and State of New York.

Fifth: The vessel "SS Hoegh Silvercloud" is now found, or during the pendency of this action will be found within the Port of New York and within the jurisdiction of this Honorable Court.

Sixth: At all times hereinafter mentioned, the respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, was the owner of, and was in possession of and operated, managed and controlled the vessel "SS Hoegh Silvercloud".

Seventh: At all times hereinafter mentioned, the respondent, Kerr Steamship Company, Inc., was in possession of and operated, managed and controlled said vessel, "SS Hoegh Silvercloud".

Eighth: At all times hereinafter mentioned, the respondent, Hamilton Marine Contracting Company, Inc., constructed a certain stairway or catwalk upon the deck of said vessel, "SS Hoegh Silvercloud".

[fol. 23] Ninth: At all times hereinafter mentioned, the respondent, Hamilton Marine Contracting Company, Inc., performed said construction work under the control, direction and with the participation of the respondents, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, and Kerr Steamship Company, Inc.

Tenth: On or about September 6, 1945, the libelant was employed as a longshoreman by Northern Dock Co., an independent stevedoring contractor, performing work upon said vessel while it was afloat in the navigable waters of the United States at Pier 3, Hoboken, New Jersey, and libelant was an invitee upon said vessel.

Eleventh: On or about September 6, 1945, while libelant was engaged in doing his work upon said vessel, and was ascending said stairway or catwalk, suddenly, due to the negligence, carelessness and recklessness of the respondents by their agents, servants and employees, and of the master, officers and crew of said vessel, one of the treads on the steps of said catwalk or stairway gave way, causing the

libelant to fall to the deck of said vessel and sustain serious injuries thereby.

Twelfth: Said accident was caused without any fault or neglect on the part of the libelant, but was caused wholly and solely by the defective, unsafe and unseaworthy condition of the vessel, and by the negligence of the respondents, their agents, servants, and employees, and by the negligence of the master, officers and crew of said vessel.

Thirteenth: That by reason of the premises aforementioned, the libelant was injured, bruised and wounded, so that he became sick, sore, lamed and disabled, and was, [fol. 24] upon information and belief permanently injured, and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing sums of money which he otherwise would have earned, and has expended and will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and has endured and will continue to endure great pain and suffering, all to his damage in the sum of Fifty Thousand ($50,000.). Dollars.

Fourteenth: All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "SS Hoegh Silvercloud", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "SS Hoegh Silvercloud" her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs, and that:

2. Monitions issue to the respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., which are an- may be served within the

jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid, and

[fol. 25] 3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as his damages with interest and costs against the respondents, as their several liabilities may appear, and

4. That the libelant herein may have such other and further relief in the premises as in the law and justice he may be entitled to receive.

Second Cause of Action

Fifteenth: Libelant, Blazey Czaplicki, repeats and realleges each and every allegation contained in those paragraphs of this libel and complaint marked and designated as "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth" of the First Cause of Action with the same force and effect as if set forth at length as part of this Second Cause of Action.

Sixteenth: On or about September 6, 1945, while libelant was engaged in doing his work upon said vessel, and was ascending said stairway or catwalk, suddenly, due to the unseaworthy condition of the vessel, one of the treads on the steps of said catwalk or stairway gave way, causing the libelant to fall to the deck of said vessel and sustain serious injuries thereby.

Seventeenth: That by reason of the premises aforementioned, the libelant was injured, bruised and wounded, so that he became sick, sore, lamed and disabled, and was, upon information and belief permanently injured, and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing sums of money which he otherwise would have earned, and has expended and [fol. 26] will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and had endured and will continue to endure great pain and suffering, all to his damage in the sum of Fifty Thousand ($50,000.) Dollars.

Eighteenth: All and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "SS Hoegh Silvercloud", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "SS Hoegh Silvercloud", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs, and that:

2. Monitions issue to the respondents, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters, aforesaid, and

3. That this Honorable Court May be pleased to decree the payment of the amount due as aforesaid to the libelant, [fol. 27] as his damages with interest and costs against the respondents, as their several liabilities may appear, and

4. That the libelant herein may have such other and further relief in the premises as in the law and justice he may be entitled to receive.

Nathan Baker, Proctor for Libelant, Office & P. O. Address, 1 Newark Street, Hoboken, N. J. and 401 Broadway (Room 2201) New York City.

[fols. 28-29] *Duly sworn to by Blazey Czaplicki; jurat omitted in printing.*

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER OF THE RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., TO THE LIBEL OF BLAZEY CZAPLICKI, IN AN ALLEGED CAUSE OF ACTION IN TORT FOR DAMAGES FOR PERSONAL INJURIES, CIVIL AND MARITIME—Filed July 22, 1952

Answering a First Cause of Action

First: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "First".

Second: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Second".

Third: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Third".

Fourth: It admits the allegations contained in article of the libel numbered "Fourth".

Fifth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Fifth".

Sixth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Sixth".

Seventh: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article of the libel numbered "Seventh".

[fol. 31] Eighth: It admits that on September 6, 1945, it was engaged on board the "SS Hoegh Silvercloud" in constructing certain steps upon the deck of the said vessel, and except as admitted, it denies the allegations contained in article of the libel numbered "Eighth".

Ninth: It denies the allegations contained in article of the libel numbered "Ninth".

Tenth: It admits the allegations contained in article of the libel numbered "Tenth", except the allegation therein that libellant was an invitee upon said vessel, and as to

this allegation it denies that it has any knowledge or information sufficient to form a belief.

Eleventh: It denies the allegations contained in article of the libel numbered "Eleventh".

Twelfth: It denies the allegations contained in article of the libel numbered "Twelfth".

Thirteenth: It denies the allegations contained in article of the libel numbered "Thirteenth".

Fourteenth: It denies the allegations contained in article of the libel numbered "Fourteenth".

Answering a Second Cause of Action

Fifteenth: It repeats and reiterates all the admissions and denials herein contained.

Sixteenth: It denies the allegations contained in article of the libel numbered "Sixteenth".

Seventeenth: It denies the allegations contained in article of the libel numbered "Seventeenth".

Eighteenth: It denies the allegations contained in article of the libel numbered "Eighteenth".

[fol. 32] For a separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Nineteenth: That any injuries sustained by the libellant at the time and place set forth in the libel were caused by his own carelessness and negligence.

For a second, separate and complete defense to the complaint herein the respondent alleges upon information and belief:

Twentieth: That the cause of action alleged in the libel herein accrued more than two years prior to the commencement of this action, and is barred by the Statute of Limitations of the State of New Jersey.

For a third, separate and complete defense to the complaint herein the respondent alleges upon information and belief:

Twenty-first: That the cause of action alleged in the libel herein accrued more than three years prior to the commencement of this action, and is barred by the Statute of Limitations of the State of New York.

For a fourth, separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Twenty-second: That with notice of the facts and acts alleged in the libel, libellant refrained from commencing this action until on or about June 12, 1952, and has thereby been guilty of such laches as bars the libellant from maintaining this action.

For a fifth, separate and complete defense to the libel herein, the respondent alleges upon information and belief:

Twenty-third: That at the time and place set forth in the libel, libellant was an employee of Northern Dock Company, Inc., and as such employee was engaged in performing his duties on board the "SS Hoegh Silvercloud", [fol. 33] a vessel of more than eighteen tons net then lying in the navigable waters of the United States.

Twenty-fourth: That at the time and place set forth in the libel there was and still is in full force and effect a statute of the United States known as the Longshoremen's and Harbor Workers' Compensation Act, being Title 33 U.S.C., Sections 901 et seq., as amended.

Twenty-fifth: That at the time and place set forth in the libel, libellant was engaged in the course of his employment in a maritime employment, and was an employee of Northern Dock Company, Inc., within the meaning of said compensation act.

Twenty-sixth: That the said employer had prior to September 6, 1945, duly complied with the provision of said law, and duly secured to its employees, including libellant, compensation, as provided in said compensation act, by insuring the payment of compensation with the Travelers Insurance Company, and that the said policy of insurance was in full force and effect at the time and place set forth in the libel.

Twenty-seventh: That subsequent to the happening of the accident set forth in the libel, libellant duly filed a claim for compensation with the U. S. Employees' Compensation Commission, Second Compensation District, and thereafter, and on September 28, 1945, the Deputy Commissioner, Second Compensation District, made an award and order directing the payment of compensation to the libellant in accordance with said compensation act.

Twenty-eighth: That thereafter, and in pursuance to such award the said employer, through its insurance carrier, The Travelers Insurance Company, duly paid the sums directed to be paid by said order and award, and that said payments operated as an assignment to the employer and/or its compensation insurance carrier, The Travelers Insurance Company, with all rights of the libellant herein to recover damages for the injuries set forth [fol. 34] in the libel.

Twenty-ninth: That by reason of the foregoing, the libellant is not the owner of the cause of actions alleged in the libel, and cannot maintain this action against the respondent.

Wherefore, the respondent, Hamilton Marine Contracting Company, Inc., demands judgment that the libel be dismissed as to it with costs and disbursements, and that it have such other and further relief as may be just.

Galli & Locker, Proctors for Respondent, Hamilton Marine Contracting Company, Inc. Office & P. O. Address, 80 John Street, New York 38, N. Y.

[fols. 35-36] *Duly sworn to by Frederic J. Locker. Jurat omitted in printing.*

[fol. 37] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF EXCEPTIONS OF KERR STEAMSHIP COMPANY, INC.— Filed July 30, 1952

Sir: Please take notice, that respondent Kerr Steamship Company, Inc., excepts to the libel and complaint of Blazey Czaplicki as follows:

First. That as appears from said libel (Exhibit "A" annexed) and from the exceptive allegation hereunto at-

tached and by reference made a part hereof, the libelant is barred from commencing this action because of his laches.

Second. That as appears from the aforesaid exceptive allegations libelant is barred from commencing this action because he has elected and received a Formal Compensation Award (Exhibit "B" annexed) and benefits under title 33 [fol. 38] USC, 901 et seq., commonly known as the Longshoremen's and Harbor Worker's Compensation Act.

Please take further notice, that said exceptions and exceptive allegations will be brought on for hearing at a Stated Term of the within-named Court to be held for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York on the 19th day of August, 1952, at 10:00 A. M. in the forenoon of said day or as soon thereafter as counsel can be heard at which time a motion will be made for an order sustaining said exceptions and dismissing the libel herein.

Yours, etc., Haight, Deming, Gardner, Poor & Havens, Proctors for Respondent Kerr Steamship Company, Inc., 80 Broad Street, New York 4, N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 401 Broadway, New York 13, N. Y.

[fol. 39] In United States District Court

Exceptive Allegations of Kerr Steamship Company, Inc. —Filed July 30, 1952

First. That at all the times mentioned in the libel, Kerr Steamship Company, Inc., was and is a corporation existing under and by virtue of the laws of the State of Delaware with an office and place of business at 32 Pearl Street in the City, County and State of New York.

Second. That libelant has elected and received a Formal Compensation Award and benefits from the United States Compensation Commission under date of September 28, 1945, as signed by Louis Schwartz, Deputy Commissioner, and is therefore barred from pursuing this action under title 33 USC, 901 et seq., commonly known as the Longshoremen's and Harbor Workers' Compensation Act.

Third. That as appears from the libel herein this accident happened September 6, 1946. This present action was commenced on or about June 12, 1952. Because of the delay in commencing the within proceeding respondent has been prejudiced to its detriment in investigating the matter and libelant has therefore been guilty of laches.

[fol. 40] Wherefore, respondent Kerr Steamship Company, Inc., respectfully requests that the said libel may be dismissed together with costs and disbursements and that respondent have such other and further relief as to the Court may seem just and proper.

Haight, Deming, Gardner, Poor & Havens, Proctors for Kerr Steamship Company, Inc., 80 Broad Street, New York 4, N. Y.

[fol. 41] *Duly sworn to by William J. Gelling. Jurat omitted in printing.*

[fols. 42-49] EXHIBIT "A"

Libel omitted. Printed side page 21 ante.

[fol. 50] EXHIBIT "B"

Copy

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
Second Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

BLAZEY CZAPLICKI, Claimant,

against

NORTHERN DOCK COMPANY, Employer,

TRAVELERS INSURANCE COMPANY, Insurance Carrier

Compensation Order Award of Compensation Case No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

Findings of Fact:

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud", which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach the catwalk leading to a hatch, the steps gave way and he fell about five

[fol. 51] feet in consequence of which he sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at $22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to $45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of $45.00, and shall continue payments thereafter in bi-weekly installments at $22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 641 Washington Street, New York City, this 28th day of September, 1945.
L. G. Schwartz, Deputy Commissioner, Second Compensation District.

[fols. 52-53] Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the

employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Glazey Czaplicki, 259 4th Street, Jersey City, N. J.
Northern Dock Company, Pier 3, River Street, Hoboken, N. J.
Travelers Insurance Company, 60 Park Place, Newark, N. J.

Dennis O'Keefe, Claims Examiner.

Mailed September 28, 1945.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWERING AFFIDAVIT OF BLAZEY CZAPLICKI BY LIBELANT ON EXCEPTIONS TO LIBEL AND COMPLAINT BY RESPONDENT, KERR STEAMSHIP COMPANY, INC.—Filed December 11, 1952

STATE OF NEW JERSEY,
County of Hudson, ss:

Blazey Czaplicki, being duly sworn, deposes and says:

I am the libelant in the above matter and reside at 259 4th Street, Jersey City, New Jersey.

On September 6, 1945 I was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, and was loading the SS. Hoegh Silvercloud. During lunch hour the carpenter had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and I fell and injured myself. The steps were not fastened or secured by the carpenters and were carried away when I stepped on it. The carpenters were not connected with my company, but were working for separate carpenter company which I am told is the Hamilton Marine Contracting Company.

I injured my left side, my left thigh, my left elbow, my right leg and my left testicle.

[fol. 55] I was treated by Dr. Londrigan for seven weeks. When he refused to treat me any more I then went to other doctors, Dr. Dodson of Jersey City, Dr. Halligan of Jersey City and Dr. Ralph Abels of Jersey City. As a result of my injuries in this accident Dr. Abels operated upon me at the Fairmount Hospital and removed my left testicle. This operation took place in August 1946. I have not been doing any work since February 1950.

A few weeks after I was injured, during the end of September, 1945, I went to the U. S. Compensation Commission to get compensation and I was told to sign a paper which I did, after which they paid me compensation for seven weeks at $22.50 per week, or a total of $160.72 and I never received any compensation or monies after that.

I did not receive any notice of any hearing, nor did I attend any hearing. I was not represented by an attorney. I do not know what was in this paper I signed, but I was told if I signed the paper I would get compensation and medical treatment.

At that time I did not know anything about what is meant by a third party action and I did not know that I could sue the carpenter people and I did what they told me to do.

I have since found out that the Travelers Insurance Co. were the insurance company for my employer, Northern Dock, and were also the insurance company for the carpenter people, Hamilton Marine Contracting Company, who were responsible for my accident. At the time when I signed this paper in compensation I was totally disabled and was unable to work and was still under treatment.

Later on I went to see lawyers, Hoberman & Hoberman, [fol. 56] of Jersey City, who filed a suit in my behalf in the Hudson County Court of Common Pleas on April 30, 1946, which suit was filed against Kerr Steamship Company. I am informed that the suit was dismissed on November 22, 1946 on motion, on the ground that this company was not properly served in New Jersey. I am informed that a New York attorney filed another suit in New York which he discontinued voluntarily without my consent. I do not know this lawyer, Paul Murphy, who I

am informed started the suit, nor do I know what happened.

I then engaged Joseph Hanrahan of Hoboken as my lawyer who engaged Nathan Baker and they have tried to get service of papers upon the owners of the ship and the ship. I am informed that they were unable to do so for a long period of time as the Norwegian Shipping and Trade Mission could not be found in the United States, nor could the ship, Hoegh Silvercloud, be found in the United States upon whom libel could be served.

There will be no prejudice to the Steamship Company because I can still get the witnesses who can show how the accident happened and I will be glad to give them the names and addresses of these witnesses. Furthermore, they knew about this accident and probably investigated it immediately after the happening of this accident. The first employers report filed in compensation describes the accident exactly as follows: "Man was ascending steps to get over catwalk to No. 1 hatch. Steps were not fastened and they carried away." This report was filed by Northern Dock on September 6, 1945 with the Compensation Commission. Since the Travelers Insurance Company represented my employer, and also were the insurance company [fol. 57] for the carpenter company, Hamilton Marine Contracting Company, they have all the knowledge and information concerning the accident and I am sure have the names and addresses of witnesses and statements from witnesses.

Blazey Czaplicki

Sworn and subscribed to before me this 28th day of October, 1952. Gertrude Bremer, Notary Public of New Jersey.

[fol. 58] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF FRANCIS X. BYRN—Filed December 11, 1952

STATE OF NEW YORK,
County of New York, ss.:

Francis X. Byrn, being duly sworn, deposes and says that he is an attorney associated with the proctors for the respondent Kerr Steamship Company, Inc., and is fully familiar with all proceedings had herein.

This affidavit is made in reply to libelant's memorandum of law and his answering affidavit verified the 28th day of October, 1952.

With respect to Mr. Czaplicki's affidavit, he alleges that, among other things, he injured his left testicle on September 6, 1945. In the findings of fact made by the Deputy Commissioner as part of the Formal Compensation Award there is not the slightest indication of such a serious and painful injury, nor will the compensation records which deponent has subpoenaed for this hearing bear out this contention.

[fol. 59] Mr. Czaplicki also alleges that he received no notice of hearing, nor was he represented by counsel, nor did he know what he was signing. That Mr. Czaplicki reads and understands English is manifest from his affidvit. The compensation records will also indicate that Mr. Czaplicki's rights were explained to him, that he made a definite decision to elect compensation after pondering the possibility of a third-party suit, and that he did not desire an attorney. He did not demand a hearing, as he must under Title 33 U.S.C. 919(c):

> "The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim and *upon application of any interested party* shall order a hearing thereon." (Italics

The affidavit of Richard S. Lombard, verified the 30th day of October, 1952, shows abundant opportunity to proceed against the "Hoegh Silvercloud" in the United States. Kerr Steamship Company, Inc., has been in New York at all times since the accident and was indeed served in the Supreme Court action, as shown in respondent's memorandum of law. Furthermore, as the affidavit of service on Oivind Lorentzen shows, it was the Norwegian Consulate that was ultimately served in New York. If this be good service in June, 1952, it would certainly be good service prior thereto.

Respondent did not investigate this accident, as the injuries were apparently slight and libelant had indicated his willingness to receive a Formal Compensation Award.

With respect to libelant's memorandum of law, it is contended that the procedural requirements of Title 33 U.S.C. 919 have not been met. A perusal of the compensation [fol. 60] records shows that said requirements have been complied with:

1. Claim has been filed as required under 919(a).

2. It was not necessary to notify claimant (919(b)), as to the employer and carrier notice is presumed (Title 33 U.S.C. 920(b)).

3. The Deputy Commissioner investigated the case, as required under 919(c). (See Formal Compensation Award.) No party applied for a hearing, and it was thereby waived by all.

4. Section 919(e) says:

> "The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each."

The document herein has as its caption alongside the title:

"Compensation Order"

"Award of Compensation"

It was also sent by registered mail on September 28, 1945, to all parties.

Concededly, under Section 919(*e*), the Deputy Commissioner did not wait twenty days after notice of claim was given to make the formal award; but said notice need not have been given under Section 919(b) to claimant, and neither the employer nor the carrier has ever contested this irregularity. The hearing is primarily for their benefit to contest the claim. Here Mr. Czaplicki obtained the more favorable of two results: His claim was not rejected. He *did* receive an award.

[fol. 61] Further, a similar irregularity with respect to the twenty-day period referred to in Section 919(e) has been held to be unimportant under a limitation that "is directory not mandatory or jurisdictional." *Maryland Casualty Co.* v. *Cardillo*, 99 F. (2d) 432 (C.C.A. Dist. Col., 1938). "The twenty-day provision in the last sentence of 919(e) we regard as neither mandatory nor jurisdictional." *Candado Stevedoring Corp.* v. *Willard*, 185 F. (2d) 232 (C.C.A. 2, 1950).

The reason for the speedy action on the part of the Deputy Commissioner is obvious. The carrier, hearing of the possibility of a third-party suit, withheld compensation. The Deputy Commissioner acted expeditiously in Mr. Czaplicki's interest to afford him the compensation he requested.

Libelant has attempted by indirection to circumvent the provisions of Title 33 U.S.C. 921(d):

> "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter."

Libelant also contends that laches may not be shown by exceptions and exceptive allegations. In so doing he has not cited a single case in this Circuit. This Circuit is committed to the propriety of such procedure. *The Sydfold*, 86 F. (2d) 611 (C.C.A. 2, 1936); *Hughes* v. *Roosevelt*, 107 F. (2d) 901

(C.C.A. 2, 1939). See, also, *Westfal-Larsen v. Allman-Hubble*, 73 F. (2d) 200 (C.C.A. 9, 1934).

Libelant relies heavily on *Gardner v. Panama R. Co.*, 342 U. S. 30. Plaintiff's diligence in that case was apparent, [fol. 62] especially in view of the relatively short one-year limitation.

If the question of laches is not disposed of on this motion or at a hearing called for that purpose, it will be more than ten years after the accident before this case is reached for trial.

As an added element of prejudice to respondent, your deponent has just learned by a telephone call with the Compensation Office that Deputy Commissioner Schwartz is deceased.

Wherefore, deponent respectfully prays for the relief requested in the moving papers herein.

Francis X. Byrn.

Sworn to before me this 30th day of October, 1952. Margaret E. Obertz, Notary Public, State of New York. No. 41-2922800. Qualified in Queens County. Cert. filed with N. Y. Co. Clks. Cert. filed with Queens Co. Reg. Commission Expires March 30, 1953. (Seal.)

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF RICHARD S. LOMBARD—Filed December 11, 1952

STATE OF NEW YORK,
County of New York, ss:

Richard S. Lombard, being duly sworn, deposes and says that he is a clerk in the employ of Haight, Deming, Gardner, Poor & Havens, proctors for respondent Kerr Steamship Company, Inc. That he has inspected the issues of the New York Maritime Register for the years 1946, 1947 and

1948, and of Lloyd's Shipping Index Voyage Supplement for the years 1949, 1950 and 1951, and that the said publications report that the Norwegian motorship "Hoegh Silvercloud" was present in the following American ports on the dates given:

1945	New York	August 12—September 8
1946	New York	January 10—February 22
	Seattle	July 8—July 13
	Los Angeles	July 15—July 18
	San Francisco	July 20—July 24

[fol. 64]

1947	Los Angeles	January 5—January 8
	San Francisco	January 9—January 18
	Seattle	February 9—February 9
	Los Angeles	February 15—February 17
	San Francisco	February 19—February 23
	Boston	September 8—September 10
	New York	September 11—September 15
	Baltimore	September 16—September 18
	New York	September 19—October 1
	Philadelphia	October 2—October 4
1948	New York	May 21—June 4
	Philadelphia	June 5—June 7
	Norfolk	June 8—June 9
	Seattle	November 24—November 26
1949	Tacoma	January (—)—January 9
	Portland (Ore.)	January 10—January 14
	Seattle	July (—)—July 12
	Los Angeles	July 15—July 16
	San Francisco	July 18—July 28
1950	Boston	March 29—March 30
	New York	March 31—April 7
	Philadelphia	April 8—April 8
	Hampton Roads	April 9—April 14
	Philadelphia	April 14—April 16
	New York	April 17—April 17
	Albany (N. Y.)	April 18—April 19
	New York	April (—)—April 22
1951	New York	April 28—May 6
	Hampton Roads	May 7—May 13
	New York	October 23—November 11
	Philadelphia	November 12—November 14
	Baltimore	November 14—November 17
	Hampton Roads	November 18—November 18
	Houston	November 25—November 29
	New Orleans	December 1—December 5
	New York	December 11—December 14

Richard S. Lombard.

Sworn to before me this 30th day of October, 1952. Margaret E. Obertz, Notary Public, State of New York. No. 41-2922800. Qualified in Queens County.

Cert. filed with N. Y. Co. Clks. Cert. filed with Queens Co. Reg. Commission expires March 30, 1953. (Seal of Margaret E. Obertz, Notary Public, State of New York.)

[fol. 65] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BLAZEY CZAPLICKI, Libelant,

against

s/s HOEGH SILVERCLOUD, Her Boilers, Engines, Tackle, Apparel and Furniture

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF the Royal Norwegian Government, Doing Business Under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

MEMORANDUM—December 11, 1952

Nathan Baker, Esq., Proctor for Libelant, 401 Broadway, New York 13, New York.

Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for Respondent Kerr Steamship Company, Inc., 80 Broad Street, New York 4, New York.

Sidney Sugarman, U. S. D. J.

[fol. 66] SUGARMAN, D. J.:

On exceptions and exceptive allegations of respondent Kerr Steamship Company to the libel of Blazey Czaplicki.

Libelant was injured on September 6, 1945 while going aboard the S.S. Hoegh Silvercloud in the performance of his duties as a longshoreman employed by the Northern Dock Company.

He was advised (by letter dated September 25, 1945 from D. B. O'Keeffe, Claims Examiner in the office of the Com-

pensation Commission) of his right to sue a third party and of the effect of acceptance of compensation under an award, namely, the assignment to his employer of any cause of action to recover damages from a third party.

Thereafter D. B. O'Keeffe incorporated in the Commission's file a report stating:

> "The claimant called on September 27, 1945, and the provisions of Section 33(b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.
>
> He filed a Claim for Compensation and a formal order will be issued accordingly."

[fol. 67] Libelant's claim having been duly filed, a formal order and award was made in the proceeding by a Deputy Commissioner. Under this award, libelant received a total of $160.72 at the rate of $22.50 per week for disability ending December 25, 1945.

Notwithstanding, on April 30, 1946, this libelant commenced a third party suit against respondent Kerr Steamship Company, Inc., in New Jersey in the Hudson County Court of Common Pleas to recover damages for his injuries. This suit was dismissed on November 22, 1946 for improper service of process on Kerr Steamship Company. A second suit to recover for libelant's injuries was then commenced and later voluntarily discontinued.[1]

By October 4, 1948, libelant had retained his present counsel, but the libel herein was not filed until June 12, 1952.

The exceptions and exceptive allegations of respondent Kerr Steamship Company, Inc., were brought on to be heard on the grounds (1) libelant is barred from com- [fol. 68] mencing this action because he has elected to receive and did receive compensation under an award in

[1] Respondent's brief alleges this suit was commenced in Supreme Court, New York County, and was discontinued November 26, 1947. Libelant asserts it was both commenced and discontinued without his consent.

a compensation order filed by the Deputy Commissioner, and (2) libelant is barred from commencing this action because of laches.

Libelant meets the first exception with the challenge that the Deputy Commissioner's award, made without a hearing, constituted no more than a memorandum and is not "an award in a compensation order filed by the deputy commissioner", the acceptance of compensation under which operated as an assignment of his claim to his employer.[2]

I disagree. Under the procedure in respect of claims set up by the statute,[3] if no hearing is demanded by an interested party the Deputy Commissioner need not order one and may proceed to an order either rejecting the claim or making an award.

Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keeffe's categorical statement of what transpired on September 27, 1945 docketed in the Commission's file the next day, I cannot accept libelant's statement (in his answering affi- [fol. 69] davit of October 28, 1952) more than seven years later that he didn't understand what O'Keeffe told him, as a basis for upsetting the finality of the Deputy Commissioner's award.

Accordingly the exception and exceptive allegation that libelant is barred for having "elected and received a Formal Compensation Award and benefits under Title 33 U.S.C. 901 et seq." is sustained.

No consideration is given the exception based on laches.

Libel dismissed.

Dated: December 11, 1952

New York, New York.

Sidney Sugarman, United States District Judge.

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[2] 33 U.S.C.A. 933b.

[3] 33 U.S.C.A. 919(c).

[fol. 70] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BLAZEY CZAPLICKI, Libelant,

against

s/s HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture,

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents.

A 173-113

ORDER AND FINAL DECREE—December 29, 1952

Respondent Kerr Steamship Company, Inc., having made a motion for an order sustaining its exceptions to the libel herein on the grounds (1) that libelant is an improper party, libelant having accepted compensation under a formal compensation award issued under Title 33 U.S.C. 933(b), and (2) libelant's laches, and the said motion having duly come on to be heard before the Honorable Sidney Sugarman on the 30th day of October, 1952, and Haight, Deming, Gardner, Poor & Havens, by Francis X. Byrn, Esq., of counsel, having appeared in support of said motion, and Nathan Baker, by Bernard Chazen, Esq., of counsel, having appeared in opposition thereto, and having been argued and submitted, and the Court, after due deliberation, having rendered its decision contained in a written memorandum opinion sustaining respondent Kerr Steamship Company, Inc.'s exceptions to the libel on the first ground above, and for that reason not considering [fol. 71] the exceptions based upon the questions of laches:

Now, on motion of Haight, Deming, Gardner, Poor &

Havens, proctors for respondent Kerr Steamship Company, Inc., it is

Ordered that respondent Kerr Steamship Company, Inc.'s exceptions to the libel based upon the existence of a formal compensation award within the meaning of Title 33 U.S.C. 933 (b), be and the same are in all respects sustained, and it is further

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed as to respondent Kerr Steamship Company, Inc.

Sidney Sugarman, U. S. D. J.

At New York, N. Y., in said District, this 29th day of December, 1952.

[fol. 72] Affidavit of Service by Mail (omitted in printing)

[fol. 73] [File endorsement omitted]

United States District Court
Southern District of New York

[Title omitted]

Notice of Appeal by Libelant—Filed Jan. 16, 1953

Sirs: Please take notice that the libelant in the above entitled cause hereby appeals to the United States Court of Appeals for the Second Circuit, from the order entered herein on the 30th day of December 1952, dismissing the libel as to the respondent, Kerr Steamship Company, Inc.

Dated: New York, N. Y.
January 13, 1953

Nathan Baker, Proctor for libelant. Office & P. O. Address: 1 Newark St., Hoboken, N. J., and 401 Broadway, New York.

To: Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondent, Kerr Steamship Co., Inc., 80 Broad

St., New York; Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York; Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondent, Oivind Lorentzen, etc., 80 Broad St., New York.

[fol. 74] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS, ETC.—Filed November 2, 1953

Sirs:

Please take notice that upon the annexed affidavit of Nathan Baker, proctor for libelant, verified on the 30th day of October, 1953, I shall move this court at a stated term thereof for the hearing of motions to be held in Room 506 on the 5th day of November, 1953, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order,

1. Dismissing the *the* Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.

2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.

3. To make the said Travelers Insurance Company a party to the said action.

4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

[fol. 75] 5. For any other order which the court may deem just.

The libelant will rely upon the pleadings and the depositions filed in this action and upon the affidavit of libelant previously filed herein, and upon the affidavit of Nathan

Baker, Esq., which is attached hereto and made a part hereof.

Dated: October 30, 1953, New York, N.Y.

Nathan Baker, Proctor for libelant, Office & P.O. Address, 1 Newark St., Hoboken, N. J. and 401 Broadway (Room 2201), New York City.

To: Haight, Deming, Gardiner, Poor & Havens, Esqs., Proctors for respondents, Oivind Lorentzen, etc., Kerr Steamship Company, Inc., 80 Broad St., New York City, N.Y. Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York City. Travelers Insurance Company, 80 John St., New York City.

[fol. 76] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, ETC.—Filed November 2, 1953

STATE OF NEW JERSEY,
County of Hudson, ss.:

Nathan Baker, being duly sworn according to law deposes and says:

I am the proctor for libelant in the above entitled action. Libelant alleges that on September 6, 1945 he was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, and was loading the SS Hoegh Silvercloud. During lunch hour the carpenter had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on it. The carpenters were not connected with his company, but were working for separate carpenter company which he was told is the Hamilton Marine Contracting Company.

[fol. 77] Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the carpenters.

From the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945 a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties.

The Travelers Insurance Company is also the insurer for respondent, Hamilton Marine Contracting Co., one of the third parties involved in this case and consequently will be liable for all or part of any recovery obtained by libelant in this action.

On December 30, 1952 the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U.S.C. 933(b). A copy of the said decree is attached hereto and made a part hereof. An appeal from said decree is now pending.

The other respondents, SS Hoegh Silvercloud, Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

The said cause of action, under the ruling of Judge Sugarman, was assigned and is controlled by the Travelers Insurance Company which was the insurance carrier for the Northern Dock Co., the employer of the libelant.

[fol. 78] Section 33(b) of the Longshoremen & Harbor Workers Compensation Act by its assignment provision as construed by Judge Sugarman made the said Travelers Insurance Company the trustee of the cause of action in which libelant and the said Travelers Insurance Company had an interest.

The Travelers Insurance Company, as assignee of the cause of action of libelant, under Judge Sugarman's deci-

sion, failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant.

Because of the conflict of interest of the trustee in this action, the libelant must appeal to the traditional powers of the court to protect his right and to do justice.

For these reasons application is made to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. and cannot take advantage of their own default in failing to sue as trustee of the cause of action.

Furthermore, libelant makes this application to the court to make the Travelers Insurance Co. a party to this action to compel Travelers Insurance Co. to sue in its behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or requiring Travelers Insurance Co. to reassign said cause of action to the libelant because of conflict of interests, and to do justice to the libelant herein.

Nathan Baker.

Sworn and subscribed to before me this 30th day of October, 1953, Gertrude Brewer, Notary Public of New Jersey. My commission expires Dec. 14, 1954.

[fols. 79-82] MEMORANDUM OPINION Omitted—Printed side page 65 ante

[fol. 83] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ZEY CZAPLICKI, Libelant,

against

S/S HOEGH SILVERCLOUD, Her Boilers, Engines, Tackle, Apparel and Furniture and Against Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents.

OPINION—Nov. 30, 1953

GODDARD, District Judge:

This is a motion by libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign [fol. 84] the cause of action for injuries suffered by libelant, to libelant.

Libelant filed this suit on June 12, 1952 to recover for injuries allegedly suffered by him, as a longshoreman employed by Northern Dock Company, while loading the S/S Hoegh Silvercloud on September 6, 1945. Libelant alleges that Hamilton negligently failed to fasten a catwalk they constructed and that it collapsed while he was on it, thereby causing his injury.

In July, 1952, one of the respondents, Kerr Steamship Company, excepted to the libel on the ground that libelant had elected to, and did, receive a compensation award under the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. §901-50]. Judge Sugarman, of this district, found that libelant had made such an election and received a compensation award, and any cause of action against a third party was thereby assigned to his employer.

The libel was dismissed as to Kerr on December 11, 1952. An appeal from this decision is pending.

Hamilton, in its answer, denies any negligence, alleges contributory negligence and laches and its fifth defense asserts that by virtue of libelant's election, the cause of action was assigned to his employer, Northern, and/or its insurance carrier, Travelers.

[fol. 85] Libelant asserts that Travelers is the insurance carrier for both northern and Hamilton and says that Travelers "has failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant." Libelant thus seems to assume that he may sue, or require Travelers to sue.

Title 33 U.S.C.A. § 933, provides:

> "Compensation for injuries where third persons are liable.
>
> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, * * *, to receive such compensation or to recover damages against such third person."
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.*
>
> * * * * * * *
>
> (d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.
>
> (e) Any amount recovered by such employer on account of such assignment, whether or not as the

result of a compromise, shall be distributed as follows:

[fol. 86] (1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise * * *;

(B) the cost of all benefits actually furnished by him to the employee under Section 907;

(C) all amounts paid as compensation;

(D) * * *

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." [emphasis added]

In *Hunt v. Bank Line*, 35 F. (2nd) 136, C.C.A. 4, 1929 the court passed on this very question. The libelant there argued that where, after the assignment of the cause of action to his employer, it refused to sue the third party because its insurance carrier was also the carrier for the vessel, the employee could bring suit, joining his employer as a party. The court held to the contrary, on the ground that the statute did not allow it. The court stated at 138:

> It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. [fol. 87] Then, and not until then, the interest of such employee arises. *And this is given by the statute, not, we think, because he is deemed to have any*

interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury." [emphasis added]

In *Johnsen v. American-Hawaiian SS Co.*, 98 F. (2nd) 847, C.C.A. 9, 1938, at 850, the court declared:

> "We think that a sound construction of the act warrants the conclusion that once the employee has made a valid binding election to accept compensation he has no further control over the cause of action against the third person whose negligence caused the injury." Accord: *The Nako Maru*, 101 F. (2nd) 716, C.C.A. 3, 1939, at 717; *Moore v. Hechinger*, 127 F. (2d) 746, C.A.D.C. 1942, at 748.

The Act gives the employee the right to elect between compensation from his employer and a suit against the third party. But he cannot have both. *Moore v. Hechinger*, supra, at 748; *Fontana v. Penna R. Co.*, 106 F. Supp. 461, 463.

Having made his election to receive the compensation award, the libelant has no further rights against Hamilton. *Currant v. Eastern SS Lines*, 77 F. Supp. 9, affirmed on the opinion of the district court, 170 F. (2nd) 948, C.C.A. 1, 1948.

However, if Northern, or its insurance carrier, Travelers, had brought suit against Hamilton and recovered an amount in excess of the compensation paid, plus expenses incurred in the suit, Northern, or its insurance carrier, would hold such excess as trustee for the libelant. [fol. 88] It follows that the motion to strike the defense must be denied.

It also follows that libellant's attempt to require Travelers to bring suit must be denied. Under the Act, by the express election of libelant, all rights were assigned to the carrier here. By the specific terms of the Act, the carrier is given control of the litigation, upon assignment. *Calif. Casualty Indemnity Exchange v. United States*, 74 F. Supp. 410; *The Aden Maru*, 51 F. (2nd) 599, 600. It is the carrier's right to compromise the employee's claim against third parties as it sees fit. *The Etna*, 138 F. (2nd) 37, C.C.A. 3, 1943, at 40.

The employee is entitled to claim compensation although the accident was due partly or entirely to his own negligence. It is plain that, since the carrier's liability to pay compensation is absolute whereas the possible liability of a third party is grounded on proof of its negligence, there will be many occasions where the carrier may not be able to recover over against the third party. cf. *Loraine v. Coastwise Lines*, 86 F. Supp. [illegible]. The Act clearly gives the carrier the freedom, in the absence of fraud, to weigh its chances of recovery and to make its choice to sue or not, accordingly. "The authority on the part of the employer to compromise without instituting suit negatives any right on the part of the employee to have suit instituted. And it is to be noted, also, that the employee is given no power to control or veto the compromise." *Hunt v. Bank* [fol. 89] *Line*, supra, at 137.

In *Moore v. Hechinger*, supra, the court in holding that an employee was not a proper party plaintiff in a suit against a third party by the insurance carrier, stated at p. 749:

> "Furthermore, reason compels this conclusion, for if the employee is a necessary or proper party, the freedom of action which the statute vests in the employer in the circumstances we are considering would be lost. He could neither dismiss, settle, nor prosecute over the objection of his co-plaintiffs. His hands would be tied, and the thing which the statute gives him absolutely would be subject to the control of another. Such a result the language of the statute does not warrant."

This reasoning is applicable here. To allow a libelant to step in again, after he has deliberately made his election to accept the award, and to require that suit be brought, would contravene the intent of the statute. To require a carrier to institute suit where in its judgment there may be little or no chance for recovery would be oppressive, and contrary to the Act.

Were there a showing of fraud, the result might be different. cf. *The Kokusai Kisen Kabushiki Kaisha*, 44 F. (2nd) 659; *United States Fidelity & Guaranty Co. v. United States*, 152 F. (2d) 46, C.C.A. 2, 1945, at 48; *Currant v. East-*

SS Lines, supra. The libelant does not charge fraud. In fact his charges fall far short of the usual requirements for pleading fraud, cf. Rule 9(b) F.R.C.P.

[fol. 90] The New York cases, under the New York Workmen's Compensation Law, a similar statute, have also held that the statutory assignment is absolute, in the absence of fraud, cf. *Skakandy v. New York*, 274 App. Div. 153, affirmed 298 N.Y. 886; *Taylor v. New York Central RR*, 294 N.Y. 397, 402; *Monti v. Gimbel Bros.*, 192 Misc. 811; affirmed 275 App. Div. 845.

Motion denied. Settle order on notice.

November 30th, 1953.

Henry W. Goddard, U.S.D.J.

[fol. 91] [Title omitted]

IN UNITED STATES DISTRICT COURT

NOTICE OF SETTLEMENT OF ORDER—Filed Dec. 14, 1953

Sirs:

Please take notice that an order of which the within is a copy will be presented for settlement and signature to Hon. Henry W. Goddard, Judge, of the United States District Court at the office of the Clerk of this court at the Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 11th day of December, 1953, at 11:00 o'clock in the forenoon of that day.

Dated, New York, N. Y. December 4, 1953.

Yours, etc. Galli & Locker, Proctors for Respondent, Hamilton Marine Contracting Co., Inc. Office & P. O. Address: 80 John Street, New York 38, New York.

To: Nathan Baker, Esq., Proctor for Libelant. Office & P. O. Address: 401 Broadway (Room 2201), New York, N. Y.

To: Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondents, Oivind Lorentzen, etc. and Kerr Steamship Co., Inc., 80 Broad Street, New York, N. Y.

[fol. 92] [Title omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER DENYING MOTION TO DISMISS, ETC.—Filed Dec. 14, 1953

A motion by the libelant, Blazey Czaplicki, for an order:

1. Dismissing the Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.

2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.

3. To make the said Travelers Insurance Company a party to the said action.

4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

5. For any other order which the court may deem just,

having duly come on for hearing before this court on November 5, 1953, and upon reading and filing the said notice of motion dated October 30, 1953 and the affidavit of Nathan Baker verified October 30, 1953 together with a copy of the memorandum of Sidney Sugarman, United States District Judge, attached thereto and the affidavit of Bernard J. McGlinn verified the 4th day of November, [fol. 93] 1953, and after hearing Nathan Baker, proctor for the libelant, in support of said motion and Galli & Locker, by Bernard J. McGlinn, proctors for respondent Hamilton Marine Contracting Company, Inc., in opposition thereto and due deliberation having been had and upon filing the opinion of the court dated November 30, 1953, it is

Ordered that the said motion is in all respects denied.

Henry W. Goddard, U. S. D. J.

[fol. 94] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 95] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF BERNARD J. MCGLINN IN OPPOSITION TO MOTION TO STRIKE—NOV. 4, 1953

STATE OF NEW YORK
County of New York, ss:

Bernard J. McGlinn, being duly sworn, says:

I am an attorney in the office of Galli & Locker, proctors for Hamilton Marine Contracting Company, Inc., one of the respondents herein. As such, I am familiar with the facts in this case and make this affidavit in opposition to the libelant's motion for an order dismissing the Fifth Separate Defense contained in the answer of the respondent, Hamilton Marine Contracting Company, Inc.

The libelant was an employee of Northern Dock Company, Inc. On September 6, 1945, he was injured in the course of his employment. He elected to take compensation under the Longshoremen's and Harbor Workers' Compensation Act. On September 28, 1945, the Deputy Commissioner in the Second Compensation District made an award and order directing the payment of compensation [fol. 96] to the libelant in accordance with the Longshoremen's and Harbor Workers' Compensation Act. The said compensation was duly paid to the libelant by The Travelers Insurance Company, the insurance carrier for the Northern Dock Company, Inc. The payment by The Travelers Insurance Company to the libelant of the said compensation pursuant to the order of the Deputy Commissioner dated September 28, 1945 under the Longshoremen's and Harbor Workers' Compensation Act operated as an assignment of the libelant's claim to recover damages against any third party. Thereafter, the libelant brought this action against the ship, SS Hoegh Silvercloud, and against the three respondents. The respondent, Hamilton Marine Contracting Company, Inc., in its answer to the

libel pleaded as a Fifth Separate Defense thereto (Twenty-third to Twenty-ninth) the facts above set forth to the effect that the libelant's accepting workmen's compensation pursuant to an award and by so doing his cause of action was automatically assigned to his employer, Northern Dock Company, Inc., or its compensation carrier, The Travelers Insurance Company.

It is this Fifth Defense which libelant now seeks to strike out in the answer of the respondent, Hamilton Marine Contracting Company, Inc.

On December 29, 1952, District Judge Sugarman dismissed the libelant's libel as to the respondent, Kerr Steamship Company, Inc. The basis of Judge Sugarman's decision was that the libelant had accepted compensation payments under the Longshoremen's and Harbor Workers' Compensation Act and that by accepting such compensation payments pursuant to an award the libelant's cause of action was assigned to his employer or his employer's insurance carrier. The defense pleaded is good. By accepting workmen's compensation under [fol. 97] the Longshoremen's and Harbor Workers' Compensation Act, the libelant lost any cause of action he had against the third party. Libelant's motion to dismiss the Fifth Cause of Action and to add The Travelers Insurance Company as a trustee for libelant should be denied.

On this motion I also appear for The Travelers Insurance Company. The Travelers Insurance Company does not consent to be made a party to this litigation.

Wherefore, I respectfully request that the libelant's motion be denied in its entirety.

Sworn to before me this 4 day of November, 1953.

Bernard J. McGlinn.

[fol. 98] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

EXCEPTIONS OF LORENTZEN—Filed December 23, 1953

Sirs:

Please take notice that respondent Oivind Lorentzen, Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, excepts to the libel and complaint of Blazey Czaplicki on the grounds that said Blazey Czaplicki is an improper party libelant, as has already been held in this case as to Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, #20212, by Judge Sidney Sugarman, Exhibit A annexed, and as given effect in an order dated December 29, 1952, by the Honorable Sidney Sugarman, Exhibit B annexed.

Please take further notice that said exceptions will be brought on for a hearing in a Stated Term of the within-named Court, to be held for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 17th day of January, 1954, at ten o'clock in the forenoon of said day, or as [fol. 99] soon thereafter as counsel may be heard, at which time the motion will be made for an order sustaining said exceptions and dismissing the libel herein as to Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission.

Dated, New York, N. Y., December 22, 1953.

Yours, etc., Haight, Deming, Gardner, Poor & Havens, Proctors for Oivind Lorentzen, as Director of Shipping, etc., 80 Broad Street, New York 4, N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 1 Newark Street, Hoboken, N. J.; Galli & Locker, Esqs., Proctors for Respondent, Hamilton Marine Contracting Company, Inc., 80 John Street, New York 38, N. Y.

[fols.100-104] EXHIBIT "A"—Memorandum Opinion omitted. Printed side page 65 ante

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[fols. 105-106] EXHIBIT "B"—ORDER AND FINAL DECREE—December 29, 1952—Omitted. Printed side page 70 ante

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[fol. 107] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 108] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BLAZEY CZAPLICKI, Libelant,

against

S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel, etc., and

against

OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

FINAL DECREE—May 10, 1954

This cause having duly come on to be heard on the 20th day of April, 1954, before the Honorable Sylvester J. Ryan,

upon the pleadings and proofs, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having heretofore filed exceptions to the libel and complaint on the grounds that said Blazey Czaplicki, is an improper party libelant, as has already been held in this case as to respondent, Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, No. 20212, by the Honorable Sidney Sugarman, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having moved the Court on its exceptions, and respondent Hamilton [fol. 109] Marine Contracting Company, Inc., having by answer raised the defense that Blazey Czaplicki is an improper party libelant, relying as well on the afore-mentioned opinion and decision of the Honorable Sidney Sugarman, and having moved to dismiss the libel and complaint on these grounds, and this matter having been argued and submitted by the proctors for the respective parties, and the Court, after due deliberation having rendered its decision in open court, directing a decree dismissing the libel herein, with prejudice and without costs.

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with prejudice and without costs as to respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc., on the authority of the opinion and decision of Judge Sugarman, No. 20212, filed December 11, 1952, holding that Blazey Czaplicki was an improper party libelant, having accepted compensation under a formal award and order filed by the Deputy Com- [fol. 110] missioner within the meaning of Title 33, U.S.C., Sec. 933(b).

Dated at New York, N. Y., in said District this 10th day of May, 1954.

Sylvester J. Ryan, U.S.D.J.

[fol. 111] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 112] The attached decree was this day found in the folder of the case in Room 507 by William Maiers, a clerk in the office of Haight Deming Gardner Poor & Havens, Proctors for respondent. Said decree did not bear the file mark of the Court, nor had it been docketed in the case. Mr. Maiers called my attention to this paper. I have this day placed the file mark of the Court upon it.

Robert Follmer, Admiralty Docket Clerk.

6/24/54.

[fol. 113] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed July 16, 1954

Sirs:

Please take notice that the Libelant in the above entitled cause hereby appeals to the United States Court of Appeals for the Second Circuit, from the final order and decree dated May 10, 1954 and filed June 24, 1954 dismissing the libel as to the respondent Oivind Lorentzen as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of the Norwegian Shipping and Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc. and from each and every part of the said order and decree.

Dated: New York, N.Y. July 15, 1954.

Nathan Baker, Proctor for libelant. Office & P.O. Address, 1 Newark St., Hoboken, N. J. and 220 Broadway, New York City.

To: Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York. Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondent, Oivind Lorentzen, 80 Broad St., New York.

[fol. 114] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CROSS-ASSIGNMENTS OF ERROR OF KERR STEAMSHIP COMPANY, INC., ET AL.—Filed July 20, 1954

The respondents, Kerr Steamship Company, Inc., and Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government doing business under the name and style of The Norwegian Shipping & Trade Mission, hereby assign error in the proceedings, decrees, orders, and decisions of the District courts made by Judge Sidney Sugarman and Judge Sylvester J. Ryan as follows:

First: The District Courts erred in failing to dismiss the libel on the grounds of libelants laches in addition to the grounds upon which it was dismissed, to-wit, that libelant had elected and received compensation under a formal award pursuant to an order filed with the Deputy Commissioner under Section 33 U.S.C. 933 subdivision (b).

[fol. 115] Second: The District Courts erred by not holding that this action should be dismissed on the grounds that libelant did not pursue the remedies prescribed for review of compensation orders by proceeding against the Commissioner within 30 days after filing of such order as prescribed in Section 33 U.S.C. 921 (a) and (b).

Dated New York, N. Y., July 19, 1954.

Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents Kerr Steamship Company, Inc. and Oivind Lorentzen, etc., 80 Broad Street, New York 4, N. Y.

To: Nathan Baker, Esq., Proctor for Libelant, 1 Newark Street, Hoboken, N. J. Galli & Locker, Esqs., Proctors for Respondent Hamilton Marine Contracting Company, Inc., 80 John Street, New York 38, N. Y.

[fol. 116] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

[fol. 117] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1954

No. 278

BLAZEY CZAPLICKI, Libelant-Appellant,

v.

The Vessel "SS HOEGH SILVERCLOUD" Her Boilers, Engines, Tackle, Apparel and Furniture, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, Doing Business Under the Name and Style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents

OPINION—May 23, 1955

Before Clark, Chief Judge, and Frank and Hastie, Circuit Judges

Appeals from the United States District Court for the Southern District of New York, Judges Sugarman, Goddard and Ryan, presiding.

Libelant Czaplicki appeals from the dismissal of libels against Kerr Steamship Company, Inc., and SS Hoegh Silvercloud and Oivind Lorentzen, and from the denial of a motion to make the Travelers Insurance Company a party to the action and to compel the Travelers Insurance Company to sue, in its own behalf and as trustee for libelant,

for injuries sustained by libelant when employed as a longshoreman loading the SS Hoegh Silvercloud. The libel was [fol. 118] dismissed, and the motion to make the Travelers Insurance Company a party was denied, because Czaplicki had previously accepted compensation under the Longshoremen & Harbor Workers Act, 33 U. S. C. Section 933(b). Affirmed.

Nathan Baker (Proctor for libelant, Baker, Garber & Chazen, of counsel); Bernard Chazen on the brief. Galli & Locker (Patrick E. Gibbons, of counsel), proctors for respondent.

The libelant is a longshoreman formerly in the employ of the Northern Dock Company. While loading the SS Hoegh Silvercloud at a Hoboken pier, he was injured by the collapse of steps built by carpenters in the employ of the Hamilton Marine Contracting Company. Both the Northern Dock Company and the Hamilton Marine Contracting Company were insured aaginst liability by the Travelers Insurance Company.

Three months after the accident, the libelant visited the offices of the Travelers Company and several days later the offices of the United States Employees Compensation Commission, and discussed with them the methods available to him to receive compensation for his injury. At the office of the Compensation Commission he was explained the applicable sections of the Longshoreken's and Harbor Workers Act, 33 U. S. C. 901 et seq., which provides that a longshoreman may file a claim for compensation for injuries with the Commission (Sec. 919, that the deputy commissioner shall reject the claim or award compensation in respect of it (Sec. [fol. 119] 919(c), that acceptance of award of compensation shall operate as an assignment to the employer of all rights to recover damages against any third person responsible for the injury, Sec. 933(b); that the employer may either institute proceedings against the third person or compromise without formal proceedings, Sec. 933(d), that the amount recovered from the third person shall be retained by the employer up to the amount paid out under the award of compensation, and any excess paid to the injured party, Sec. 933(e), and that if the employer is insured and the in-

surance company has paid the award of compensation, the insurance company shall be subrogated to all of the employer's rights under the statute; Sec. 933(i).

Czaplicki stated that he wished to receive the statutory award of compensation. A formal award of $16,072 was then made, and this amount was paid to him by the Travelers Insurance Company, insurers of Czaplicki's employer, to whose rights they were subrogated. The Insurance Company never brought suit against the third person, the Hamilton Marine Contracting Company, for whom they were also insurers.

Seven years later, in 1952, the libellant instituted the present action against the Hamilton Company, the vessel, and Oivand Lorentzen and the Kerr Steamship Company, Inc., owners and operators of the vessel. The Kerr Company excepted, partially on the grounds that libellant, by accepting the award of compensation, had waived his rights in the matter and was no longer a proper party to bring suit. [fol. 120] Judge Sugarman dismissed the libel as to the Kerr Company on those grounds. Libellant then moved to strike one of Hamilton's defenses—that by virtue of his election he was no longer a proper party to bring suit—and further moved to add the Travelers Insurance Company as a party-plaintiff or to order Travelers to assign its cause of action in the matter to the libellant. Judge Goddard denied the motion in all respects on the grounds that, in the absence of fraud, the assignment was absolute. Judge Ryan then held a hearing and dismissed the libel as to the other parties on the authority of Judge Sugarman's earlier decision. Libellant has appealed.

FRANK, Circuit Judge:

1. When an injured party elects to receive an award of compensation under the terms of the Longshoremen's and Harbor-Workers' Compensation Act, the election operates as an assignment to his employer or his employer's insurer, of his right of action against third persons who may have caused the injury. Hunt v. Bank Line, 35 F. (2d) 136 (C. A. 4). The injured party is not without a financial interest in subsequent proceedings, however, for if the assignee recovers from the third person any amount in excess

of the award of compensation, that excess goes to the injured party. Libellant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand, written in respect of the statute as to compromises [fol. 121] between assignee and tortfeasor: ". . . although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest." United States Fidelity & Guaranty Co. v. United States, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party.

We do not, however, need to decide this issue; for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libelant resides and where the accident occurred, or the statute of limitations of New York, where suit was brought, is our guide, the time has long since passed when the assignee might have recovered against the alleged tortfeasor.

2. Libelant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceedings. But the statute allows direct judicial review of an award, 33 U. S. C. § 921, and that section provides the exclusive method of securing judicial relief. Even assuming, however, that [fol. 122] an award may be thus collaterally attacked, libelant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on

the claim or make an award without a hearing after twenty days has expired since service on the employer of notice of the claim. 33 U. S. C. § 919. In the instant case, there was no hearing nor was a hearing requested. Admittedly, the deputy commissioner did not wait until twenty days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim.

Affirmed.

[fols. 123-125] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BLAZEY CZAPLICKI, Libelant-Appellant

v.

S/S HOEGH SILVERCLOUD, etc., Respondent,

OLIVAND LORENTZEN, as Director, etc., et al., Respondents-Appellees

JUDGMENT—May 23, 1955

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

(S.) A. Daniel Fusaro, Clerk.

[fol. 126] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed June 7, 1955

To the Chief Judge and the Circuit Judges of the United States Court of Appeals for the Second Circuit.

The petition of Blazey Czaplicki, respectfully shows:

Summary Statement of Matter Involved

This petition is submitted pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Second Circuit for a rehearing of the appeals in this action which were argued on April 13, 1955 before Chief Judge Clark [fol. 127] and Circuit Judge Frank and Circuit Judge Hastie. The opinion of this Court was rendered on May 23, 1955 and was written by Circuit Judge Frank. The opinion of this Court was based upon a finding of laches. A copy of Circuit Judge Frank's opinion appears in the appendix herein. This issue was not decided by the courts below and petitioner wishes to argue that in view of the opinion of the court the action should be reversed and remanded for further proceedings on the issue of laches. In addition, there are some minor errors of fact in the preamble to the opinion which should be corrected in the interest of accuracy.

Point I

The appeal has been decided on an issue as to which libelant has not had his day in court.

The court below made no findings on the issue of laches either as to inexcusable delay or as to prejudice to the respondents. In *Taylor* v. *Crain*, 195 F. 2d 163 (3 Cir. 1952) a label was filed over five years after the accident. The District Court dismissed without a hearing. In reversing and remanding, Judge Goodrich stated at page 165:

> "* * * The libelant is entitled to an opportunity to prove what he alleges in his excuse for delay."

Libelant offered to amend his libel to allege that no

> prejudice resulted against respondent from the delay. The district judge felt this necessary in view of our statement in the Kane case, that 'Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the respondent from such delay' (189 F. 2d 305). The amendment should be allowed as it was in Redman v. United States, 2 Cir., 1949, 176 F. 2d 713; Hughes v. Roosevelt, 2 Cir., 1939, [fol. 128] 107 F. 2d 901 and The Sydfold, 2 Cir., 1936, 86 F. 2d 611."

The Supreme Court in *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 72 S. St. 12, 96 L. Ed. 31 (1951) in a *per curiam* opinion stated at page 30:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * *"

Judge Sugarman decided the exceptive allegations of respondent Kerr Steamship Company solely on the ground that libelant's cause of action had been assigned. See page 1a et seq. of the appendix to libelant's original brief on this appeal.) Judge Sugarman specifically stated (p. 3a):

> "No consideration is given the exception based on laches."

Judge Goddard in deciding on petitioner's motion to strike the defense of statutory assignment in the answer filed by Hamilton Marine Contracting Co., Inc. and to add Travelers Insurance Company as a party or to order Travelers Insurance Company to assign the cause of action back to libelant, did not deal with the issue of laches. (See page 6a *et seq.* of the appendix to libelant's original brief.)

Judge Ryan on hearing the balance of the case decided it solely on the ground that the law of the case had been

settled by the opinions of his brother judges. (See page 28a of the appendix to libelant's original brief.)

[fol. 129] Petitioner should be given an opportunity to prove the facts which would negative laches. If amendments to pleadings are required he should be given an opportunity to amend them. Furthermore, as to the parties insured by the Travelers Insurance Company, they should not be permitted to benefit by the failure of the Travelers Insurance Company to sue on libelant's cause of action.

Point II

There are errors in the preliminary statement to the court's opinion.

(a) the preliminary statement states that libelant visited the offices of Travelers Company and the United States Employees Compensation Commission "three months after the accident." The accident happened on September 6, 1945. The award by the Deputy Commissioner was dated September 28, 1945 (Lib. Exh. 2). He had talked to the representatives of the Travelers Insurance Company prior to that date. Therefore the interval was three "weeks" at most rather than three "months."

(b) The preliminary statement states that libelant was given a formal award of $16,072. The award provided (Lib. Exh. 2):

> "* * *; 2 weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of $45.00, and shall continue payments thereafter in bi-weekly installments at $22.50 per week until disability shall have ceased or otherwise ordered."

He actually received a total of $160.72 and not $16,072" as stated in the preliminary statement.

[fol. 130] Conclusion

Petitioner requests that the case be reversed and remanded so that he may have his day in court on the issue of laches.

Respectfully submitted, Nathan Baker, Proctor for Libelant-Appellant.

Baker, Garber & Chazen, of Counsel; Bernard Chazen, on the Petition.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

Nathan Baker.

[fol. 131] United States Court of Appeals
for the Second Circuit

[Title omitted]

Per Curiam Order Denying Rehearing—June 14, 1955

Before Clark, Chief Judge, and Frank and Hastie, Circuit Judges.

On Petition for Rehearing.

Nathan Baker, Hoboken, N. J. (Baker, Garber & Chazen and Bernard Chazen, Hoboken, N. J. on the brief), for libelant-appellant.

Per Curiam. Petition for rehearing denied.

C. E. C., J. N. F., W. H. H., C.JJ.

70A

Exhibit 3

FOR MAILING INSTRUCTIONS SEE REVERSE SIDE

Form US-302

LEAVE THIS SPACE BLANK

Case No. 65-437

Insurance Carrier's No. 40

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner

Administering Longshoremen's and Harbor Workers' Compensation Act

Employer's First Report to Deputy Commissioner of Accident or Occupational Disease

EMPLOYER

1. Employer's name Northern Dock Company, (Individual or firm name)
2. Office address Pier 3, River Street (Street and number) Hoboken, N. J. (City or town)
3. Nature of business Stevedoring & Terminal Operators (Goods produced, work done or kind of trade or transportation)
4. Insurance carrier The Travelers Insurance Company 5. When was carrier notified?

INJURED PERSON

455 Kent Ave Brklyn

6. Full name of injured person Blazey Znaplicki 140-03-9711 His check No. 7924
7. Address: Street and No. 259 - 4th Street City or town Jersey City, N. J.
8. Sex male Age 60 Speak English? If not, what language?
9. Injured person's regular occupation Longshoreman
10. Was he injured in regular occupation? If not, occupation when injured
11. Wages or average earnings per day, $ 10.00 ; per week, $ (Include overtime, bonuses, etc.)
12. Working days per week Any other advantage?
13. Length of service in occupation Were full wages paid for day of injury?

THE INJURY

14. Place where injury occurred "L. Silveraloud" - Pier 3, River St. Hoboken, N. (Give place and name of vessel)
15. Name of foreman A. Pellari
16. Date of accident or first illness Sept. 6, 1945 (Month, day, year) Last day worked (Month, day, year)
17. When did you or your foreman first have knowledge of injury?
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Man was ascending steps to get over catwalk to 1 Hatch. Steps were not fastened & they carried away - man fell & bruised right leg & left thigh. (Immediate cause of alleged injury or disease)
19. Machine, tool, or thing in connection with which accident or disease occurred (If machine, indicate part)

Cert Copy

INJURED PERSON

8. Sex male Age 60 Speak English? If not, what language?
9. Injured person's regular occupation Longshoreman
10. Was he injured in regular occupation? If not, occupation when injured
11. Wages or average earnings per day, $ 10.00 ; per week, $ (Include overtime, bonuses, etc.)
12. Working days per week Any other advantage?
13. Length of service in occupation Were full wages paid for day of injury?

THE INJURY

14. Place where injury occurred "L. Silveraloud" - Pier 3, River St. Hoboken, N. (Give place and name of vessel)
15. Name of foreman A. Pellari
16. Date of accident or first illness Sept. 6, 1945 (Month, day, year) Last day worked (Month, day, year)
17. When did you or your foreman first have knowledge of injury?
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Man was ascending steps to get over catwalk to 1 Hatch. Steps were not fastened & they carried away - man fell & bruised right leg & left thigh. (Immediate cause of alleged injury or disease)
19. Machine, tool, or thing in connection with which accident or disease occurred (If machine, indicate part)

NATURE AND EXTENT OF INJURY

20. Nature of injury or occupational disease Bruised legs (State exactly the part of the person affected and the character of injury or disease)
21. Was member or part of member lost?
22. Will injury probably result in serious head or facial disfigurement?
23. Did injury cause loss of time? (Yes or No) If "yes," on what date? went home. SEP 11 1945, 19
24. Has injured person returned to work? (Yes or No) If "yes," on what date? , 19
25. Did you provide or authorize medical attention? (Yes or No) When?
26. Physician Dr. Londrigan - 832 Bloomfield St. Hoboken, N. J. (Name) (Address)
27. Hospital (Name) (Address)

Dated Sept. 6, 1945., 19

Firm name Northern Dock Co.

(Signed) R. Hunt, timekeeper (Official title)

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-211) must be made at the termination of disability, or at the end of fifteen days if disability had not then ended.

C-3641 PRINTED IN U.S.A. 6-14-44

[fol. 132] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—June 14, 1955

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed October 24, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Here follows 1 Photolithograph, side folio 135)

[fol. 140] LIBELANT'S EXHIBIT 4

Case No. —

Insurance Carrier's No. B-5981165

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
Office of Deputy Commissioner —

Administering Longshoremen's and Harbor Workers' Compensation Act

Notice to the Deputy Commissioner that Claim will be Controverted

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to Commission)

Note.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer: Northern Dock Co., Inc.

2. Office address: Street and No.: Pier 3, River St., City or town: Hoboken.

3. Name of injured person: Blazey Czaplicki.

4. Present address: Street and No.: 259 4th St., City or town: Jersey City.

5. Date of alleged accident or first illness: 9-6, 1945, 1:20 P.M.

6. Nature of alleged accident or occupational disease: Contusions of legs, elbow & left chest.

7. When was notice of injury received from employer? 9-11, 1945.

8. This case will be controverted for the following reasons:

(a) For weekly wage? —.
(b) For rate of compensation? —.
(c) For period of disability? —.

66A

Form US-908

Exhibit 1

Budget Bureau No. 70-R013.
Approval expires 2-29-48.

LEAVE THIS SPACE BLANK

CASE NO. 6V-438

INSURANCE CARRIER'S NO. .....

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner .....

Administering Longshoremen's and Harbor Workers' Compensation Act

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON

1. Name of employee Blazey Czaplicke Employee's check No. .....
2. Address: Street and No. 209 E 40th St City or town Bayonne N.J.
3. Sex M Age 69 Married, single, widowed .....
4. Do you speak English? Yes Nationality Amer
5. State regular occupation Longshoreman
6. What were you doing when injured? Repair
7. (a) Wages or average earnings per day, $ 15 Sun (Include overtime, board, rent, and other allowances.) (b) Per week, $..... (c) Were you employed elsewhere during week in which you were injured? ..... (d) If so, state where and when .....
8. Were you paid full wages for day of accident? .....

EMPLOYER

9. Employer Morton Dock Co
10. Office address: Street and No. ..... City or town .....
11. Nature of business Stevedoring

THE INJURY

12. Place where injury occurred Dry Dock "A" Selover and "Kahalan" Hoboken N.J. (Give place and name of vessel)
13. Name of foreman J. Belgano
14. Date of accident or first illness, the 6 day of Sept, 1945 at 1 o'clock P. M.
15. How did accident happen or how was occupational disease caused? Accidently slipped & fell 4-ft. hurting left leg

16. State fully nature of injury or occupational disease: .....
17. On what date did you stop work because of injury? Same day, 194...
18. Have you returned to work? (Yes or No) No If "yes," on what date? ....., 194...

8. Were you paid full wages for day of accident? .....
9. Employer Morton Dock Co
EMPLOYER 10. Office address: Street and No. ..... City or town .....
11. Nature of business Stevedoring
12. Place where injury occurred Dry Dock "A" Selover and "Kahalan" Hoboken N.J. (Give place and name of vessel)
13. Name of foreman J. Belgano
THE INJURY 14. Date of accident or first illness, the 6 day of Sept, 1945 at 1 o'clock P. M.
15. How did accident happen or how was occupational disease caused? Accidently slipped & fell 4-ft. hurting left leg
16. State fully nature of injury or occupational disease: .....
17. On what date did you stop work because of injury? Same day, 194...
18. Have you returned to work? (Yes or No) No If "yes," on what date? ....., 194...

NATURE AND EXTENT OF INJURY

19. Does injury keep you from work? (Yes or No) Yes
20. Have you done any work in period of disability? No
21. Have you received any wages since injury? No If so, from and to what date? .....
22. Has injury resulted in amputation? ..... If so, describe same .....
23. Did you request your employer to provide medical attendance? Yes Has he done so? Yes
24. Attending physician: Name Dr Rondreger Address .....
25. Hospital: Name ..... Address .....

NOTICE

26. Have you given your employer notice of injury? (Yes or No) Yes When? Same day, 194...
27. If such notice was given, to whom? Timekeeper
28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by Blazey Czaplicki
Claimant.

Dated 9/27, 194...

Mail address .....

16—41040-2

(d) If controverted for any other reason, state fully below:

Injured is undecided whether or not to sue the 3rd party and reserves the right to controvert for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? ——.

(*Yes or No*)

Name of Insurance Carrier: The Travelers Insurance Company.

Signed by: R. W. Bennett. Official title: Investigator.

Dated 9-17, 1945.

[fol. 141] LIBELLANT'S EXHIBIT 5

65-438

Carrier's No. B-5081165

September 28, 1945.

Travelers Ins. Co.,
60 Park Place,
Newark, N.J.

Re: Blazey Czaplicki, Northern Dock Co., Inj. 9/6/45

Gentlemen:

Pursuant to Section 19 (b) of the Longshoremen's and Harbor Workers' Compensation Act, you are advised that the above claimant has filed a Claim for Compensation with this office, copy of which is enclosed.

Very truly yours, D. B. O'Keeffe, Claims Examiner.

DBO/ERC:
Enc.

[fol. 136] LIBELANT'S EXHIBIT 2

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Second Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

BLAZEY CZAPLICKI, Claimant,

against

NORTHERN DOCK COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier

COMPENSATION ORDER

AWARD OF COMPENSATION

Case No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

Findings of Fact:

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud" which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach a catwalk leading to a hatch, the steps gave way and he fell about five feet in conse-

[fol. 137] quence of which he sustained a contusion and

[fol. 142] LIBELANT'S EXHIBIT 6

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner, District 2

641 Washington Street, Corner Christopher Street

New York, N. Y. (14),

12/5/45.

File No. 65-438, D-5931165

Mr. Blazey Czaplicki.

Re: Blazey Czaplicki, Northern Dock Co., Inc., Inj. 9/6/45

GENTLEMEN:

In accordance with the medical findings and opinion in the enclosed report of examinations made by our Medical Advisor, it is requested that the recommendations in the paragraph or paragraphs hereinbelow identified with the letter (X) be carried out:

( ) That payment of compensation be continued.

( ) That further medical treatment be furnished the claimant.

( ) That further medical treatment be furnished the claimant after working hours or at such time as to not cause loss of time from work.

( ) That the claimant be kept under medical observation and periodic reports of the progress of the case be forwarded to this office.

To Claimant

In view of the findings in the enclosed report of examination, the paragraph or paragraphs hereinbelow identified by the letter (X) indicate the action to be taken in your case.

(X) You have no further disability for work, and as there appears to be no permanent impairment your case will be closed, subject to the limitations of the Act.

( ) You are able to resume work but should return to this office in three months for a final medical exami-

nation to determine as to whether you have any permanent inpairment.

Very truly yours, D. B. O'Keeffe, Claims Examiner.

"CP. 3/11. Says working only a day or two a week pain left hip."

[fol. 143] Respondent Hamilton's Exhibit A

Memorandum for the File

September 28, 1945.

File #65-438

Re: Blazey Czaplicki, Northern Dock Co., Inj. 9/6/45

Compensation payments have been withheld in this case by the carrier because of the possibility of the injury having been caused by the negligence of a third party.

The claimant called on September 27, 1945, and the provisions of Section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

He filed a Claim for Compensation and a formal order will be issued accordingly.

D. B. O'Keeffe, Claims Examiner.

DBO/ERC.

(6713-2)

abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at $22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to $45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, inclusive, in the amount of $45.00, and shall continue payments thereafter in bi-weekly installments at $22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 641 Washington Street, New York City, this 28th day of September, 1945.

Louis G. Schwartz, Deputy Commissioner, Second Compensation District.

[fol. 75] LIBELANT'S EXHIBIT 7

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 173-173

BLAZEY CZAPLICKI, Libellant,

against

SS. HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture,

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents.

Deposition of Travelers Insurance Company, by Gene Innocenti, on behalf of the libellant, at the United States Court-House, Foley Square, New York, N. Y., on June 25, 1953, at 2:30 o'clock P. M., pursuant to notice dated January 12, 1953.

Appearances:

Nathan Baker, Esq., Proctor for libellant.

Galli & Locker, Esqs., Proctors for respondent Hamilton Marine Contracting Company, Inc., by Royce A. Wilson, Esq., advocate.

[fol. 76] It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that signing, sealing, filing, and certification of the within deposition are hereby waived;

It is further stipulated and agreed that all objections except as to the form of the questions are hereby reserved to the time of the trial;

It is further stipulated and agreed that a copy of the said deposition shall be furnished to the adverse parties without cost to them.

[fol. 138] Proof of Service

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Glazey Czaplicki, 259 4th Street, Jersey City, N.J.
Northern Dock Company, Pier 3, River Street, Hoboken, N.J.
Travelers Insurance Company, 60 Park Place, Newark, N.J.

D. B. O'Keeffe, Claims Examiner.

Mailed September 28, 1945.

Mr. Wilson: Royce A. Wilson objected to Mr. Baker examining the file which he had subpoenaed and by agreement of counsel they appeared before Judge Dimock in his chambers, Room 1903, of this court.

Upon appearing before Judge Dimock, Mr. Wilson submitted a copy of the memorandum of Judge Sugarman, dated December 11, 1952, in this matter. Mr. Wilson explained to the Court that by his conversation with Mr. Baker it was apparent that what Mr. Baker was to inquire into were the circumstances under which the libellant [fol. 77] in this case had elected to accept compensation.

In respect to this, Mr. Wilson contended that the order in the compensation matter was not subject to collateral attack in this action, and therefore not properly the subject of inquiry on the part of Mr. Baker.

After hearing both counsel, Judge Dimock stated that he felt no harm could come from giving Mr. Baker what he sought in this examination and that there would be no waiver on the part of Mr. Wilson's client of the defenses interposed in the answer by virtue of acceding to the information sought by the subpoena.

By agreement of counsel, it was decided that this statement should be dictated into the minutes of this examination in order that it would be properly a part of this record.

Mr. Baker: In so far as I am concerned, it is my understanding that it was to be placed on the record a statement to show that Mr. Wilson objected to my seeing the file of Travelers Insurance Company and that the Court ruled that I could see the file and that this would not [fol. 78] constitute any waiver in so far as the defendant or the Travelers Insurance Company was concerned.

Mr. Wilson: By direction of Judge Dimock, there were three papers in this file which Mr. Baker was permitted to make copies of or otherwise question the custodian of the file, namely:

1. The investigation report.
2. The investigation report continued; and
3. The unsigned statement of the claimant, the libellant, in this case.

JENE INNOCENTI, called as a witness by the libellant, having first been duly sworn by the notary public, testified as follows:

Examination by Mr. Baker:

Q. Mr. Innocenti, what is your position with the Travelers Insurance Company?

A. I am a claim adjuster.

Q. And connected with what office?

A. The Newark Branch Office of the Travelers Insurance Company.

Q. And have you appeared at the taking of this deposition of Travelers Insurance Company pursuant to a subpoena served upon the Travelers Insurance Company to produce the records of the matter of Blazey Czaplicki [fol. 79] vs. The Northern Dock Company?

A. Yes, I am here in answer to that subpoena.

Q. Who investigated this claim in so far as these records show?

A. Richard Bennett.

Q. And was he an employee of the Travelers Insurance Company?

A. Yes, he was.

Q. Is he still employed in the Travelers Insurance Company?

A. Yes, he is.

Q. Where is he now located?

A. He is now located with the Perth Amboy Branch.

Q. Did you have anything to do with the handling of this claim of Blazey Czaplicki?

A. No.

Q. So that you have no personal knowledge of it?

A. That is right.

Q. Does the file disclose who appeared at the hearing in the Compensation Commission?

A. I don't know.

Q. Could you tell me from examining this file what representative of the Travelers Insurance Company was present when there was a compensation award made in [fol. 80] the United States Compensation Commission under date of September 28, 1945?

Mr. Wilson: Objected to on the ground that it assumes something which is not in evidence. It assumes that there was someone present at the time.

The Witness: No.

Q. Well, do you personally know who was present?

Mr. Wilson: Objected to on the ground that it assumes someone was present.

A. No.

Q. Who was in charge of handling the compensation file as of September, 1945, on behalf of the Travelers Insurance Company?

A. Mr. Burton was in charge of all compensation cases in the Newark office.

Q. Now, in accordance with this yellow sheet—what do you call that, by the way?

A. That is called a registration and report of investigation.

Q. And from the statement of "Cause of Action," would you read that?

A. (Reading:) "Ascending steps to get over catwalk to No. 1 hatch. Steps were not fastened and they carried away. Man fell."

Q. And on this yellow sheet is printed the following: [fol. 81] "Is right of subrogation involved?" What was the answer on that?

A. Yes.

Q. And what does that indicate in so far as your experience in——

Mr. Wilson: No. That I object to.

Q. Would you read the narrative report as to the cause and description of accident?

A. (Reading) "On 9/6/45 about 1:20 p. m., returning from lunch on ship on way to his job man climbed a temporary flight of steps to get over the catwalk to the hatch. These steps had been made by outside contractor and were put in place by somebody, either employees of the outside contractor or members of the crew, not known, sometime between 12 and 1 when the longshoremen were out for lunch. Neither the ship, the SS Hoegh Silvercloud nor the outside contractor are now at the pier, so further investigation could not be made. Other men walking ahead

of claimant had used the steps but when claimant got to the top of the steps they pulled away and claimant fell a distance of about five feet. These steps had not been fastened in any way."

Mr. Wilson: May we put this on the record: Mr. Baker peruses yellow sheet with witness and asks witness to [fol. 82] read that which follows the caption 'Claimant'?

The Witness: "Claimant—Polish, sixty years old, married, no dependent children, about six feet, weighing 250 pounds; speaks broken English; owns his own home; married daughter lives on upper floor; friendly; is undecided at the present time whether to sue the third party or to accept compensation, but his daughter——"

Mr. Wilson: Witness continues reading from white sheet, the same being captioned "R. & RO-1, continued."

The Witness (continuing reading): "but his daughter is very much in favor of bringing suit. Unsigned statement is attached."

Q. All right, subrogation.

A. (Reading) "Subrogation—He said contractor was the Hamilton Marine Contracting Company, of Brooklyn, the SS Hoegh Silvercloud is leased by Kerr Steamship Lines.

"Remarks: Claimant will inform us if he desires compensation. He was instructed through his daughter to contact the USC when he had made his decision whether or not to sue the third party.

"Form 207 to USC, copy attached.

[fol. 83] "Submitted for review:

"Dated 9-17-45," and signed "R. Bennett."

Q. Would you read the unsigned statement of the claimant, Czaplicki?

A. (Reading) "I, Blazey Czaplicki, age sixty, married, no dependent children, living at 259—Fourth Street, Jersey City, state the following:

"On September 6, 1945, I was working on board a ship at Pier 3, Hoboken, and working for Northern Dock Company. About 1:20 p. m. I came back from lunch and was about to start work again. There was a lot of lumber piled around on the deck and some carpenters working for some other company had built a flight of wooden steps

and these steps were in place to get over the catwalk to the hatch.

"The steps were not there when I went out for lunch. I saw other men use these steps ahead of me, so I went up the steps. I am a heavy man and when I got to the top of the steps they broke or slipped away and I fell down about five feet.

"I thought that these steps were nailed or fastened in place, but they weren't.

"I do not know who put the steps there, but I think it was the carpenters.

[fol. 84] "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I do not want to bother to sue anybody.

"I have been a longshoreman since 1930, and before that I worked for the Penn Railroad for fourteen years.

"The only other accident I have had was to my left thumb.

"The only parts of me that were hurt in this accident were my left hip and leg, my left elbow, my right leg, and the left side of my chest.

"Refused to sign.

"Taken by R. Bennett at Jersey City, New Jersey, on September 17, 1945."

Q. This unsigned statement that you read you have indicated was taken by Mr. Bennett, according to the record?

A. I did already.

Q. Now, in this file which has been produced here is there a first notice of accident form?

A. Yes.

Q. And what does that report state concerning the acci-

[fol. 85] dent?

(Discussion off the record.)

Mr. Baker: The witness reading in part from the paper referred to.

A. (Reading) "An outside contractor (Hamilton Marine Contracting Co.) who was installing wood cargo bins

on deck had fabricated a wood flight of steps but had not yet secured them.

"Between 12 and 1 p. m. a member of the ship's crew placed the steps against the bin.

"The claimant (a very heavy man) walked on steps, which gave way; and he fell, going to No. 1 hatch on top deck."

[fol. 86] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 173-113

BLAZEY CZAPLICKI, Libelant,

against

SS. HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture,

and against

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc., Respondents.

NOTICE OF TAKING DEPOSITIONS.

SIRS.

Please take notice that pursuant to Admiralty Rule 32C for the District Courts of the United States, the libelant will take the deposition upon oral examination of Travelers Insurance Company, by its officer or managing agent, and its representative who was present when the compensation award was made in the United States Compensation Commission under date of September 28, 1945, concerning the accident to Blazey Czaplicki while employed by Northern Dock Company on September 6, 1945, to be examined with respect to any matter which is relevant to the subject matter involved in the pending action, including the existence, description, nature, custody, condition and location

of any books, documents, correspondence or other tangible things and the identity and location of persons having knowledge of relevant facts; said deposition to be taken before some officer or person authorized by law to take such deposition, at the Calendar Commissioner's office, Federal Court House, Foley Square, Borough of Man- [fol. 87] hattan, City of New York, on the 6th day of February, 1953, at 3:00 p.m. and from day to day thereafter until the examination is concluded:

Dated: January 12, 1953, New York, N. Y.

Yours, etc.
Nathan Baker, Proctor for libelant, Office and P.O. Address, 1 Newark St., Hoboken, N. J., and 401 Broadway, New York City.

To:

Haight, Deming, Gardner, Poor & Havens, Esqs., Proctors for respondents, Kerr Steamship Co. Inc., Oivind Lorentzen, etc., 80 Broad St., New York City.

Galli & Locker, Esqs., Proctors for respondent, Hamilton Marine Contracting Co., 80 John St., New York City.

(7632-3)

No: 342

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

BLAZEY CZAPLICKI,

Petitioner,

—v.—

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BAKER, GARBER & CHAZEN
Of Counsel

BERNARD CHAZEN
On the Petition

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, BLAZEY CZAPLICKI, prays that a writ of certiorari issue to review the judgment and decree of the United State Court of Appeals for the Second Circuit and the denial of his petition to the said court for rehearing.

The Opinions of the Courts Below

(1) The opinion of Hon. Sidney Sugarman, *U.S.D.J.*, on the exceptions and exceptive allegations of respondent Kerr Steamship Company to the libel of Blazey Czaplicki starts at page 1a of the appendix to this petition. It is reported in *Czaplicki v. The Hoegh Silvercloud*, 110 F. Supp. 933; 1953 A. M. C. 206 (D. C. S. D. N. Y. 1952).

(2) The opinion of Hon. Henry W. Goddard, *U.S.D.J.*, on the motion of libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign the cause of action for injuries suffered by libelant to libelant starts at page 6a of the appendix to this petition. Petitioner's attorney has not found this opinion reported anywhere as yet.

(3) The oral determination of Hon. Sylvester J. Ryan, *U.S.D.J.*, dismissing the libel of petitioner appears at page 14a of the appendix to this petition. This opinion is not reported.

(4) The opinion of Hon. Jerome N. Frank, *U.S.C.J.*, affirming the decrees below appears at page 16a of the appendix to this petition. Petitioner's attorney has not found this opinion reported anywhere as yet.

Jurisdiction

(1) On May 23, 1955, the judgment and decree of affirmance of the United States Court of Appeals for the Second Circuit was made and entered.

(2) On June 14, 1955, an order denying petitioner's petition for a rehearing was made and entered.

(3) Jurisdiction to review the judgment and decree of affirmance by writ of certiorari is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented for Review

1. Whether or not a Court of Appeals decided an admiralty case properly on the defense of laches, where the issue was not passed upon by the judges of the District Court who ruled on various facets of the case and no hearing was had on the issue?

2. Whether or not a longshoreman is barred from maintaining an action in admiralty against third parties by the provisions of 33 U. S. C. §933 relating to the statutory assignment of his cause of action to his employer's insurance carrier, where he is forced to file a claim petition shortly after his accident and while he is still incapacitated and his employer's insurance carrier controverts his claim for the purpose of forcing him to elect between compensation and his third-party recovery, it appearing without the knowledge of the longshoreman, that the employer's insurance carrier is also the liability carrier for the third party primarily responsible for the accident?

3. Whether or not a court of admiralty, applying equitable principles can reassign a cause of action to a longshoreman where it appears that the employer's insurance carrier, because it insures the third party primarily responsible, is unable to prosecute the joint interest it has in trust in the third party cause of action?

4. What are the characteristics required of an "award" under 33 U. S. C. §933 to make it operate as a statutory assignment of a third-party cause of action?

Statutes Involved

33 U. S. C. A. 933(b)

"933. Compensation for injuries where third persons are liable. * * *

(b). Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

* * * * *

33 U. S. C. A. 919

"919. Procedure in respect of claims. (a) Subject to the provisions of section 913 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of

any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee."

Statement of the Case

This case involves an affirmance on an appeal of the order and decrees of three judges of the District Court. Petitioner instituted the present action by a libel in two counts, one for negligence and one for unseaworthiness.

On September 6, 1945, the libelant, while employed as a longshoreman by Northern Dock at Pier 3, Hoboken,

New Jersey was injured on board the SS HOEGH SILVERCLOUD.

The libelant was injured when he fell from steps made by the Hamilton Marine Contracting Company, which steps had not been secured. This company was insured for liability by the same Travelers Insurance Company which insured his employer for compensation. Libelant alleges that on September 6, 1945, he was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, and was loading the SS HOEGH SILVERCLOUD. During lunch hour the carpenters had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on them. The carpenters were not connected with his employer, but were working for a separate carpenter company, the Hamilton Marine Contracting Company.

The libelant in his affidavit filed in this action stated that he injured his left side, left thigh, left elbow, right leg, and left testicle in this accident. After the compensation carrier's doctor completed treatment and refused to treat him any more he went to other doctors and in August of 1946 his left testicle was removed. He states he has not worked since (Record pp. 60-63).

The records of the compensation commission show that libelant had filed a claim dated September 27, 1954, that an "award" was made on September 28, 1945, that the report of the employer dated September 6, 1945, described the accident: "Man was ascending steps to get over catwalk to #1 hatch. Steps were not fastened and they carried away—man fell and bruised right leg and left thigh."

A notice that the claim would be controverted was filed on September 17, 1945, on behalf of the insurance carrier

for the reason that the claimant was "undecided whether or not to sue the third party." A memorandum by the claims examiner states that compensation payments were withheld by the carrier "because of the possibility of the injury having been caused by the negligence of a third party" (Lib. Exh. 4; Resp. Exh. 1).

The deposition of Travelers Insurance Company disclosed that in their file in answer to the question "Is the right of subrogation involved?" the answer of "yes" is given (Lib. Exh. 7 at p. 7). It also appears from their file that claimant appeared at the insurance company office on September 17, 1945, that he was undecided as to whether he should sue or accept compensation, that he spoke a "broken English," that Hamilton Marine Company and Kerr Steamship Lines were the parties against whom a "subrogation" claim might be asserted.

In the unsigned statement of libelant in the Travelers file appears the following:

> "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I don't want to bother to sue anybody" (Lib. Exh. 7 at p. 10).

Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the employers of the carpenters.

In the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945, a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties (Record pp. 34-39).

On December 30, 1952, the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U. S. C. §933(b) (p. 3a). The present appeal includes an appeal from said decree.

The other respondents, SS HOEGH SILVERCLOUD, Oivind Lorentzen as Director of Shipping and Curator of The Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

Section 33(b) of the Longshoremen's & Harbor Workers' Compensation Act by its assignment provision, as construed by Judge Sugarman, made the said Travelers Insurance Company, in effect, the trustee of the cause of action in which libelant and the said Travelers Insurance Company jointly had an interest.

Because of the conflict of interest of the effective trustee of this action, the libelant appealed to the traditional powers of the court to protect his rights and to do justice, and he made application to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. on the ground that the true party in interest cannot take advantage of its own default in failing to sue as trustee of the cause of action (Record pp. 84-92).

Furthermore, libelant made application to the court to make the Travelers Insurance Co. a party to this action and to compel Travelers Insurance Co. to sue in its own behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or for an order requiring Travelers Insurance Co. to reassign said cause of

action to the libelant because of conflict of interests, and to do justice to the libelant herein. . .

Judge Goddard denied this motion, holding that the statutory assignment was absolute in the absence of fraud (p. 11a).

The case then came on to be heard by Judge Ryan who limited the hearing to and dealt solely with the defense of statutory assignment. Judge Ryan decided the case on the ground that the law of the case had been settled by the two opinions rendered heretofore, and he dismissed the libel as to all remaining parties (p. 30a).

Libelant appealed from all rulings.

On appeal the Court of Appeals discussed the question of the statutory assignment under 33 U. S. C. §933 which was the only ground considered by the courts below and indicated that it did not agree with the determination on this issue, but stated that the case didn't have to be decided on this issue because the libelant was barred by laches. This latter ground had not been developed in the District Court.

Libelant petitioned for a rehearing, but the petition was denied. Libelant now seeks to appeal from the judgment and order of the United States Court of Appeals for the Second Circuit.

Reasons for Allowance of the Writ

This case presents several issues of importance which have wide application in the field of maritime law. Petitioner believes that the decisions below are not in consonance with the decisions of this Court. Important questions of federal law, statutory and maritime, are involved, which should be settled by this Court.

The assignment provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.* (hereinafter referred to as LHWCA) as construed by the District Court is harsh and not in keeping with the liberal intent of Congress and the exercise of the broad equitable powers of the Admiralty Court.

The United States Circuit Court of Appeals, in deciding the appeal on the issue of laches, which issue was never reached and decided in the District Court, deprived the libelant of an opportunity to litigate this issue and departed from the accepted and usual course of judicial proceedings.

Judge Sugarman decided the exceptive allegations of respondent Kerr Steamship Company solely on the ground that libelant's cause of action had been assigned. Judge Sugarman specifically stated (p. 3a):

> "No consideration is given the exception based on laches."

Judge Goddard in deciding on petitioner's motion to strike the defense of statutory assignment in the answer filed by Hamilton Marine Contracting Co., Inc. and to add Travelers Insurance Company as a party or to order Travelers Insurance Company to assign the cause of action back to libelant, did not deal with the issue of laches (p. 6a).

Judge Ryan, who limited the hearing of the case to this issue raised by the statutory assignment defense, decided the case solely on the ground that the law of the case had been settled by the opinions of his brother judges (p. 14a).

None of the judges on the trial court level decided the various issues before them on the ground that libelant had lost his rights because of laches. The Court of Appeals, however, did not decide the case on the issues held by the District Court to be determinative, but instead disposed

of the appeal on the ground of laches. Judge Frank stated (p. 20a):

> "We do not, however, need to decide this issue; for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libelant resides and where the accident occurred or the statute of limitations of New York, where suit was brought, is our guide the time has long since passed when the assignee might have recovered against the alleged tortfeasor."

The accident in the present case occurred on September 6, 1945. The libel in the present case was filed on June 12, 1952, or six years and 9 months later. The action was based both on grounds of negligence and unseaworthiness. Under the doctrine of *LeGate* v. *The Panamolga*, 221 F. 2d 689 (2 Cir. 1955), reference would be made to the New York six year limitation provision because it included a cause of action based on unseaworthiness. Compare N. J. S. A. 2A:14-1 which is the New Jersey six year statute.

The libelant had filed affidavits on the motions made in the District Court to explain the delay. At the trial no testimony was taken on this issue, as the court only considered the defense of statutory assignment.

The libelant has not had a hearing on the issue of laches. Nor has he been given an opportunity to amend his pleadings, if such amendment is necessary, or to prove facts which would negative laches. See *Taylor* v. *Grain*, 195 F. 2d 163, 165 (3 Cir. 1952); *Redman* v. *United States*, 176 F. 2d 713 (2 Cir. 1949); *Hughes* v. *Roosevelt*, 107 F. 2d 901 (2 Cir. 1939); *The Sydfold*, 86 F. 2d 611 (2 Cir. 1936).

When the opinion of the Court of Appeals was received the petitioner applied for a rehearing but his appli-

cation was denied (p. 23a). The issue of laches is an issue of fact as well as law. Under the circumstances the court should have remanded the case to the District Court for the District Court to make findings on the issue. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88, 63 S. Ct. 454, 459, 89 L. Ed. 626 (1943).

In *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31 (1951), this Court stated at page 30:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * * "

It would appear from the opinion of the Court of Appeals that consideration was given only to the applicable statute of limitations which was automatically applied and no consideration was given to the equities of the parties.

The Court of Appeals did not follow the District Court in holding that libelant had lost his rights because of a statutory assignment. Judge Frank stated (p. 19a):

> "* * * Libelant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand, written in respect of the statute as to compromises between assignee and tortfeasor: '* * * although it is true that, by accept-

ing compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.' United States Fidelity & Guaranty Co. v. United States, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party. * * * "

Courts of admiralty apply broad equitable principles to better attain justice in cases within their jurisdiction. *United Fruit Co.* v. *United States*, 186 F. 2d 890, 896 (1 Cir. 1951); *The Kongo*, 155 F. 2d 492, 495 (6 Cir. 1946), cert. den. 329 U. S. 735, 67 S. Ct. 99, 91 L. Ed. 635 (1946); *Gardiner* v. *Dantzler Lumber & Export Co.*, 98 F. 2d 478, 479 (5 Cir. 1938). Cf. *Criston* v. *United States*, 8 F. R. D. 327 (D. C. E. D. Penna. 1947). Since a species of trust relationship existed between the libelant and the insurance carrier for the third party primarily responsible it would be inequitable for that insurance carrier, through its insured to claim the advantage of its own failure to prosecute the cause of action which had been assigned to it by operation of law.

This case involves a very important question relating to the statutory assignment provisions of the LHWCA, 33 U. S. C. §933. Both Judge Goddard in his opinion (p. 8a) and Judge Frank in his opinion (p. 19a) refer to

Hunt v. *Bank Line*, 35 F. 2d 136 (4 Cir. 1929). This case is an early one under the LHWCA. Libelant believes that this case does not state good law and that the matter should be considered and clearly defined by this Court.

This Court has indicated that the question presented in that case is still an open one. In *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 53 S. Ct. 231, 77 L. Ed. 477 (1933), the plaintiff was the employer's compensation carrier who had paid the employee's widow under an award. The carrier then sued in its own right and also to the use of widow in her own right and as administratrix. Chief Justice Stone, speaking for the court, stated at page 543:

> "Accordingly the employer is the party to bring the action and the only necessary party plaintiff in case before us. But the insurance company and the widow, both in her own right and as administratrix, are interested in the recovery. Under the common-law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. * * * Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have 'an interest * * * in obtaining the relief demanded' we do not decide. * * * Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare Hunt v. Bank Line (C. C. A.), 35 F. (2d) 136; or the insurer * * * in a case where the employer refused to co-operate in the prosecution of the action."

The opinion in the *Hunt* case rejects the trust theory of the assignment provisions of the LHWCA approved by

Judge Hand in 1945 in *United States Fidelity and Guaranty Co.* v. *United States*, 152 F. 2d 46 (2 Cir. 1945).

The *Hunt* case was decided before the amendment to Section 933 which clarified the intent of Congress not to make the rights of an injured employee under the LHWCA and his rights against third parties mutually exclusive.

The theory advanced in the *Hunt* case that the employee in accepting compensation, in effect, chose between a remedy against one of 2 joint-tortfeasors is not analogous. The remedy of the employee under the LHWCA is not based on wrongdoing. It arises from the employer-employee contractual relationship. The employee's benefits under the act are generally much less than the damages given in regular tort actions. See *Crab Orchard Imp. Co.* v. *Chesapeake and Ohio Ry. Co.*, 115 F. 2d 277 (4 Cir. 1940), cert. den. 312 U. S. 702, 61 S. Ct. 807, 85 L. Ed. 1135 (1941).

Furthermore, the *Hunt* case disregards the liberal intent of the LHWCA repeatedly announced by this Court. See *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Doleman* v. *Levine*, 295 U. S. 221, 55 S. Ct. 741, 79 L. Ed. 1402 (1935); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, 52 S. Ct. 187, 76 L. Ed. 366 (1932).

Petitioner also raised the question of what is an "award" within the meaning of the assignment provisions of 33 U. S. C. 933. Prior to 1938, before this section was amended, the mere acceptance of compensation operated as an assignment of the employee's cause of action. See *Grasso* v. *Lorentzen*, 56 F. Supp. 51 (D. C. S. D. N. Y. 1944), 149 F. 2d 127 (2 Cir. 1945), cert. den. 326 U. S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

Because this case presents important questions on matters of law and procedure this Court should grant petitioner's request.

Wherefore petitioner prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

NATHAN BAKER
Counsel for Petitioner

BAKER, GARBER & CHAZEN
Of Counsel

BERNARD CHAZEN
On the Petition

APPENDIX

Opinion of Hon. Sidney Sugarman, *U.S.D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On exceptions and exceptive allegations of respondent Kerr Steamship Company to the libel of Blazey Czaplicki.

Libelant was injured on September 6, 1945 while going aboard the S.S. Hoegh Silvercloud in the performance of his duties as a longshoreman employed by the Northern Dock Company.

He was advised (by letter dated September 25, 1945 from D. B. O'Keeffe, Claims Examiner in the office of the Compensation Commission) of his right to sue a third party and of the effect of acceptance of compensation under an award, namely, the assignment to his employer of any cause of action to recover damages from a third party.

Thereafter D. B. O'Keeffe incorporated in the Commission's file a report stating—

> "The claimant called on September 27, 1945, and the provisions of Section 33(b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.
>
> He filed a Claim for Compensation and a formal order will be issued accordingly."

Libelant's claim having been duly filed, a formal order and award was made in the proceeding by a Deputy Com-

missioner. Under this award, libelant received a total of $160.72 at the rate of $22.50 per week for disability ending December 25, 1945.

Notwithstanding, on April 30, 1946, this libelant commenced a third party suit against respondent Kerr Steamship Company, Inc., in New Jersey in the Hudson County Court of Common Pleas to recover damages for his injuries. This suit was dismissed on November 22, 1946 for improper service of process on Kerr Steamship Company. A second suit to recover for libelant's injuries was then commenced and later voluntarily discontinued.[1]

By October 4, 1948, libelant had retained his present counsel, but the libel herein was not filed until June 12, 1952.

The exceptions and exceptive allegations of respondent Kerr Steamship Company, Inc., were brought on to be heard on the grounds (1) libelant is barred from commencing this action because he has elected to receive and did receive compensation under an award in a compensation order filed by the Deputy Commissioner, and (2) libelant is barred from commencing this action because of laches.

Libelant meets the first exception with the challenge that the Deputy Commissioner's award, made without a hearing, constituted no more than a memorandum and is not "an award in a compensation order filed by the deputy commissioner", the acceptance of compensation under which operated as an assignment of his claim to his employer.

I disagree. Under the procedure in respect of claims set up by the statute[2] if no hearing is demanded by an inter-

---

1 Respondent's brief alleges this suit was commenced in Supreme Court, New York County, and was discontinued November 26, 1947. Libelant asserts it was both commenced and discontinued without his consent.

2 33 U. S. C. A. 933b.

3 33 U. S. C. A. 919(c).

ested party the Deputy Commissioner need not order one and may proceed to an order either rejecting the claim or making an award.

Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keeffe's categorical statement of what transpired on September 27, 1945 docketed in the Commission's file the next day, I cannot accept libelant's statement (in his answering affidavit of October 28, 1952) more than seven years later that he didn't understand what O'Keeffe told him, as a basis for upsetting the finality of the Deputy Commissioner's award.

Accordingly the exception and exceptive allegation that libelant is barred for having "elected and received a Formal Compensation Award and benefits under Title 33 U. S. C. 901 et seq:" is sustained.

No consideration is given the exception based on laches.

Libel dismissed.

Dated: December 11, 1952
New York, New York

SIDNEY SUGARMAN
United States District Judge

Order and Final Decree

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Respondent Kerr Steamship Company, Inc., having made a motion for an order sustaining its exceptions to the libel herein on the grounds (1) that libelant is an improper party, libelant having accepted compensation under a formal compensation award issued under Title 33 U. S. C. 933(b), and (2) libelant's laches, and the said motion having duly come on to be heard before the Honorable Sidney Sugarman on the 30th day of October, 1952, and Haight, Deming, Gardner, Poor & Havens, by Francis X. Byrn, Esq., of counsel, having appeared in support of said motion, and Nathan Baker, by Bernard Chazen, Esq., of counsel, having appeared in opposition thereto, and having been argued and submitted, and the Court, after due deliberation, having rendered its decision contained in a written memorandum opinion sustaining respondent Kerr Steamship Company, Inc.'s exceptions to the libel on the first ground above, and for that reason not considering the exceptions based upon the question of laches:

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent Kerr Steamship Company, Inc., it is

ORDERED that respondent Kerr Steamship Company, Inc.'s exceptions to the libel based upon the existence of a formal compensation award within the meaning of Title 33 U. S. C.

933 (b), be and the same are in all respects sustained, and it is further

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same hereby is dismissed as to respondent Kerr Steamship Company, Inc.

SIDNEY SUGARMAN
U.S.D.J.

At New York, N. Y., in said District, this 30th day of December, 1952.

Opinion of Hon. Henry W. Goddard, *U.S.D.J.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This is a motion by libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign the cause of action for injuries suffered by libelant, to libelant.

Libelant filed this suit on June 12, 1952 to recover for injuries allegedly suffered by him, as a longshoreman employed by Northern Dock Company, while loading the S/S Hoegh Silvercloud on September 6, 1945. Libelant alleges that Hamilton negligently failed to fasten a catwalk they constructed and that it collapsed while he was on it, thereby causing his injury.

In July, 1952, one of the respondents, Kerr Steamship Company, excepted to the libel on the ground that libelant had elected to, and did, receive a compensation award under the Longshoremen's and Harborworkers' Compensation Act [33 U. S. C. A. §901-50]. Judge Sugarman, of this district, found that libelant had made such an election and received a compensation award, and any cause of action against a third party was thereby assigned to his employer. The libel was dismissed as to Kerr on December 11, 1952. An appeal from this decision is pending.

Hamilton, in its answer, denies any negligence, alleges contributory negligence and laches and its fifth defense asserts that by virtue of libelant's election, the cause of

action was assigned to his employer, Northern, and of its insurance carrier, Travelers.

Libelant asserts that Travelers is the insurance carrier for both Northern and Hamilton and says that Travelers "has failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant." Libelant thus seems to assume that he may sue, or require Travelers to sue.

Title 33 U. S. C. A. §933, provides:

"Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, * * *, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.*

* * * * *

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise . . . ;

(B) the cost of all benefits actually furnished by him to the employee under Section 907;

(C) all amounts paid as compensation;

(D) . . .

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." [Emphasis added.]

In *Hunt* v. *Bank Line*, 35 F. (2nd) 136, C. C. A. 4, 1929 the court passed on this very question. The libelant there argued that where, after the assignment of the cause of action to his employer, it refused to sue the third party because its insurance carrier was also the carrier for the vessel, the employee could bring suit, joining his employer as a party. The court held to the contrary, on the ground that the statute did not allow it. The court stated at 138:

"It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no fur-

ther interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises. *And this is given by the statute, not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury.*" [Emphasis added.]

In *Johnson* v. *American-Hawaiian SS Co.*, 98 F. (2nd) 847, C. C. A. 9, 1938, at 850, the court declared:

> "We think that a sound construction of the act warrants the conclusion that once the employee has made a valid binding election to accept compensation he has no further control over the cause of action against the third person whose negligence cause the injury." Accord, *The Nake Maru*, 101 F. (2nd) 716, C. C. A. 3, 1939, at 717; *Moore* v. *Hechinger*, 127 F. (2nd) 746, C. A. D. C. 1942, at 748.

The Act gives the employee the right to elect between compensation from his employer and a suit against the third party. But he cannot have both. *Moore* v. *Hechinger*, supra, at 748; *Fontana* v. *Penna R. Co.*, 106 F. Supp. 461, 463.

Having made his election to receive the compensation award the libelant has no further rights against Hamilton. *Currant* v. *Eastern SS Lines*, 77 F. Supp. 9, affirmed on the opinion of the district court, 170 F. (2nd) 148, C. C. A. 1, 1948.

However, if Northern, or its insurance carrier, Travelers, had brought suit against Hamilton and recovered an amount in excess of the compensation paid, plus expenses incurred in the suit, Northern, or its insurance carrier, would hold such excess as trustee for the libelant.

It follows that the motion to strike the defense must be denied.

It also follows that libelant's attempt to require Travelers to bring suit must be denied. Under the Act, by the express election of libelant, all rights were assigned to the carrier here. By the specific terms of the Act, the carrier is given control of the litigation, upon assignment. *Calif. Casualty Indemnity Exchange* v. *United States*, 74 F. Supp. 410; *The Aden Maru*, 51 F. (2nd) 599, 600. It is the carrier's right to compromise the employee's claim against third parties as it sees fit. *The Etna*, 138 F. (2nd) 37, C. C. A. 3, 1943, at 40.

The employee is entitled to claim compensation although the accident was due partly or entirely to his own negligence. It is plain that, since the carrier's liability to pay compensation is absolute whereas the possible liability of a third party is grounded on proof of its negligence, there will be many occasions where the carrier may not be able to recover over against the third party. cf. *Loraine* v. *Coastwise Lines*, 86 F. Supp. 336, 339. The Act clearly gives the carrier the freedom, in the absence of fraud, to weigh its chances of recovery and to make its choice to sue or not, accordingly. "The authority on the part of the employer to compromise without instituting suit negatives any right on the part of the employee to have suit instituted. And it is to be noted, also, that the employee is given no power to control or veto the compromise." *Hunt* v. *Bank Line*, supra, at 137.

In *Moore* v. *Hechinger*, supra, the court in holding that an employee was not a proper party plaintiff in a suit against a third party by the insurance carrier, stated at p. 749:

> "Furthermore, reason compels this conclusion, for if the employee is a necessary or proper party, the freedom of action which the statute vests in the employer

in the circumstances we are considering would be lost. He could neither dismiss, settle, nor prosecute over the objection of his co-plaintiffs. His hands would be tied, and the thing which the statute gives him absolutely would be subject to the control of another. Such a result the language of the statute does not warrant."

This reasoning is applicable here. To allow a libelant to step in again, after he has deliberately made his election to accept the award, and to require that suit be brought, would contravene the intent of the statute. To require a carrier to institute suit where in its judgment there may be little or no chance for recovery would be oppressive, and contrary to the Act.

Were there a showing of fraud, the result might be different. cf. *The Kokusai Kisen Kabushiki Kaisha*, 44 F. (2nd) 659; *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. (2nd) 46, C. C. A. 2, 1945, at 48; *Currant* v. *Eastern SS Lines*, supra. The libelant does not charge fraud. In fact his charges fall far short of the usual requirements for pleading fraud. cf. Rule 9(b) F. R. C. P.

The New York cases, under the New York Workmen's Compensation Law, a similar statute, have also held that the statutory assignment is absolute, in the absence of fraud, cf. *Skakandy* v. *New York*, 274 App. Div. 153, affirmed 298 N. Y. 886; *Taylor* v. *New York Central RR.*, 294 N. Y. 397, 402; *Monti* v. *Gimbel Bros.*, 192 Misc. 811, affirmed 275 App. Div. 845.

Motion denied. Settle order on notice.

November 30th, 1953

HENRY W. GODDARD
U.S.D.J.

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion by the libelant, Blazey Czaplicki, for an order:

1. Dismissing the Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.
2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.
3. To make the said Travelers Insurance Company a party to the said action.
4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

5. For any other order which the court may deem just, having duly come on for hearing before this court on November 5, 1953, and upon reading and filing the said notice of motion dated October 30, 1953 and the affidavit of Nathan Baker verified October 30, 1953 together with a copy of the memorandum of Sidney Sugarman, United States District Judge, attached thereto and the affidavit of Bernard J. McGlinn verified the 4th day of November, 1953, and after hearing Nathan Baker, proctor for the libelant, in support of said motion and Galli & Locker, by Bernard J. McGlinn, proctors for respondent Hamilton Marine Con-

tracting Company, Inc., in opposition thereto and due deliberation having been had and upon filing the opinion of the court dated November 30, 1953, it is

ORDERED that the said motion is in all respects denied.

HENRY W. GODDARD
U.S.D.J.

Filed Dec. 14, 1953

Final Decree

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 173-113

[SAME TITLE]

This cause having duly come on to be heard on the 20th day of April, 1954, before the Honorable Sylvester J. Ryan, upon the pleadings and proofs, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having heretofore filed exceptions to the libel and complaint on the grounds that said Blazey Czaplicki, is an improper party libelant, as has already been held in this case as to respondent, Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, No. 20212, by the Honorable Sidney Sugarman, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having moved the Court on its exceptions, and respondent Hamilton Marine Contracting Company, Inc., having by answer raised the defense that Blazey Czaplicki is an improper party libelant, relying as well on the aforementioned opinion and decision of the Honorable Sidney Sugarman, and having moved to dismiss the libel and complaint on these grounds, and this matter having been argued and submitted by the proctors for the respective parties, and the Court, after due deliberation having rendered its decision in open court, directing a decree dismissing the libel herein, with prejudice and without costs.

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, it is

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same hereby is dismissed with prejudice and without costs as to respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc., on the authority of the opinion and decision of Judge Sugarman, No. 20212, filed December 14, 1952, holding that Blazey Czaplicki was an improper party libelant, having accepted compensation under a formal award and order filed by the Deputy Commissioner within the meaning of Title 33, U. S. C., Sec. 933(b).

Dated at New York, N. Y., in said District this 10th day of May, 1954.

SYLVESTER J. RYAN
U.S.D.J.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 278—October Term, 1954.

(Argued April 13, 1955 Decided May 23, 1955.)

Docket No. 23429

BLAZEY CZAPLICKI,

Libelant-Appellant,

—v.—

THE VESSEL "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture; OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.,

Respondents.

Before:

CLARK, *Chief Judge*, and
FRANK and HASTIE, *Circuit Judges*.

Appeals from the United States District Court for the Southern District of New York, Judges Sugarman, Goddard and Ryan, presiding.

Libelant Czaplicki appeals from the dismissal of libels against Kerr Steamship Company, Inc., and SS HOEGH SILVERCLOUD and OIVIND LORENTZEN, and from

the denial of a motion to make the Travelers Insurance Company a party to the action and to compel the Travelers Insurance Company to sue, in its own behalf and as trustee for libelant, for injuries sustained by libelant when employed as a longshoreman loading the SS HOEGH SILVERCLOUD. The libel was dismissed, and the motion to make the Travelers Insurance Company a party was denied, because Czaplicki had previously accepted compensation under the Longshoremen & Harbor Workers Act, 33 U. S. C. Section 933(b). AFFIRMED.

NATHAN BAKER (*Proctor for libelant*, Baker, Garber & Chazen, of counsel); Bernard Chazen, on the brief.

GALLI & LOCKER (Patrick E. Gibbons, of counsel), *proctors for respondent*.

The libelant is a longshoreman formerly in the employ of the Northern Dock Company. While loading the SS HOEGH SILVERCLOUD at a Hoboken pier, he was injured by the collapse of steps built by carpenters in the employ of the Hamilton Marine Contracting Company. Both the Northern Dock Company and the Hamilton Marine Contracting Company were insured against liability by the Travelers Insurance Company.

Three months after the accident, the libelant visited the offices of the Travelers Company and several days later the offices of the United States Employees Compensation Commission, and discussed with them the methods available to him to receive compensation for his injury. At the office of the Compensation Commission he was explained the applicable sections of the Longshoremen's and Harbor Workers Act, 33 U. S. C. 901 *et seq.*, which provides that a longshoreman may file a claim for compensation for injuries with the Commission (Sec. 919), that the deputy commissioner shall reject the claim or award com-

pensation in respect of it (Sec. 919(c)), that acceptance of award of compensation shall operate as an assignment to the employer of all rights to recover damages against any third person responsible for the injury, Sec. 933(b), that the employer may either institute proceedings against the third person or compromise without formal proceedings, Sec. 933(d), that the amount recovered from the third person shall be retained by the employer up to the amount paid out under the award of compensation, and any excess paid to the injured party, Sec. 933(e), and that if the employer is insured and the insurance company has paid the award of compensation, the insurance company shall be subrogated to all of the employer's rights under the statute, Sec. 933(i).

Czaplicki stated that he wished to receive the statutory award of compensation. A formal award of $16,072 was then made, and this amount was paid to him by the Travelers Insurance Company, insurers of Czaplicki's employer, to whose rights they were subrogated. The Insurance Company never brought suit against the third person, the Hamilton Marine Contracting Company, for whom they were also insurers.

Seven years later, in 1952, the libelant instituted the present action against the Hamilton Company, the vessel, and Oivind Lorentzen and the Kerr Steamship Company, Inc., owners and operators of the vessel. The Kerr Company excepted, partially on the grounds that libelant, by accepting the award of compensation, had waived his rights in the matter and was no longer a proper party to bring suit. Judge Sugarman dismissed the libel as to the Kerr Company on those grounds. Libelant then moved to strike one of Hamilton's defenses—that by virtue of his election he was no longer a proper party to bring suit—and further moved to add the Travelers Insurance Company as a party-plaintiff or to order Travelers to

assign its cause of action in the matter to the libelant. Judge Goddard denied the motion in all respects on the grounds that, in the absence of fraud, the assignment was absolute. Judge Ryan then held a hearing and dismissed the libel as to the other parties on the authority of Judge Sugarman's earlier decision. Libelant has appealed.

FRANK, *Circuit Judge*:

1. When an injured party elects to receive an award of compensation under the terms of the Longshoremen's and Harbor-Workers' Compensation Act, the election operates as an assignment to his employer or his employer's insurer, of his right of action against third persons who may have caused the injury. Hunt v. Bank Line, 35 F. (2d) 136 (C. A. 4). The injured party is not without a financial interest in subsequent proceedings, however, for if the assignee recovers from the third person any amount in excess of the award of compensation, that excess goes to the injured party. Libelant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand written in respect of the statute as to compromises between assignee and tortfeasor: " . . . although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest." United States Fidelity & Guaranty Co. v. United States, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party.

We do not, however, need to decide this issue; for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libelant resides and where the accident occurred, or the statute of limitations of New York, where suit was brought, is our guide, the time has long since passed when the assignee might have recovered against the alleged tort-feasor.

2. Libelant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceedings. But the statute allows direct judicial review of an award, 33 U. S. C. §921, and that section provides the exclusive method of securing judicial relief. Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on the claim or make an award without a hearing after twenty days has expired since service on the employer of notice of the claim. 33 U. S. C. §919. In the instant case, there was no hearing nor was a hearing requested. Admittedly, the deputy commissioner did not wait until twenty days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim.

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of May one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. WILLIAM L. HASTIE,
Circuit Judges.

BLAZEY CZAPLICKI,
Libelant-Appellant,

—v.—

s/s HOEGH SILVERCLOUD, etc.,
Respondent,

OLIVAND LORENTZEN, as Director, etc., *et al.*,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the So thern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

/s/ A. Daniel Fusaro
Clerk

Per Curiam Opinion on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BŁAŻEY CZAPLICKI,

Libelant-Appellant,

—v.—

The vessel "SS HOEGH SILVERCLOUD," her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.,

Respondents.

Before:

CLARK, *Chief Judge* and
FRANK and HASTIE, *Circuit Judges.*

On Petition for Rehearing.

NATHAN BAKER, Hoboken, N. J. (Baker, Garber & Chazen and Bernard Chazen, Hoboken, N. J., on the brief), *for libelant-appellant.*

PER CURIAM:

Petition for rehearing denied.

C. E. C.
J. N. F.
W. H. H.
C.J.J.

Filed: June 14, 1955

Order on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of June, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. WILLIAM H. HASTIE,
Circuit Judges.

BLAZEY CZAPLICKI,
Libellant-Appellant,

—v.—

S.S. HOEGH SILVERCLOUD, her engines, etc.,
Respondent,

OLIVAND LORENTZEN, as Director, etc.,
Respondents-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 342

BLAZEY CZAPLICKI,

Petitioner,

—v.—

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OLVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.

Respondents.

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Hoboken, New Jersey

BAKER, GARBER & CHAZEN
Of Counsel

BERNARD CHAZEN
On the Brief

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—v.—

The vessel "SS Hogh Silvercloud" her boilers, engines, tackle, apparel and furniture, Olvind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.

Respondents.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 56-60) is reported at 223 F. 2d 189, 1955 A. M. C. 1192 (2 Cir. 1955); the opinion of Hon. Sidney Sugarman, *U. S. D. J.* (R. 33-35) is reported at 110 F. Supp. 933, 1953 A. M. C. 206 (S. D. N. Y. 1952). The opinion of Hon. Henry W. Goddard, *U. S. D. J.* (R. 42-47) is reported at 133 F. Supp. 358 (S. D. N. Y. 1953). The opinion of Hon. Sylvester J. Ryan, *U. S. D. J.* (R. 14) is not officially reported. The granting of the petition for certiorari is reported at 350 U. S. 872, 76 S. Ct. 118, ——— L. Ed. ——— (1955).

Jurisdiction

The judgment of the Court of Appeals was entered May 23, 1955. On June 7, 1955 a petition for rehearing was filed with the Court of Appeals. The petition for rehearing was denied June 14, 1955. On August 23, 1955 the petition for writ of certiorari was filed and was granted October 24, 1955. The jurisdiction of this court is found in 28 U. S. C. 1254(1) and 2101(c).

Questions Presented

1. Whether or not the Court of Appeals decided an admiralty case properly on the defense of laches, where the issue was not passed upon by the judges of the District Court who ruled on various facets of the case and no hearing was had on the issue?

2. Whether or not a longshoreman is barred from maintaining an action in admiralty against third parties by the provisions of 33 U. S. C. §933 relating to the statutory assignment of his cause of action to his employer's insurance carrier, where he is forced to file a claim petition shortly after his accident and while he is still incapacitated and his employer's insurance carrier controverts his claim for the purpose of forcing him to elect between compensation and his third party recovery, it appearing without the knowledge of the longshoreman, that the employer's insurance carrier is also the liability carrier for the third party primarily responsible for the accident?

3. Whether or not a court of admiralty, applying equitable principles can reassign a cause of action to a longshoreman where it appears that the employer's insurance carrier, because it insures the third party primarily re-

sponsible, is unable to prosecute the joint interest it has in trust in the third party cause of action

4. What are the characteristics required of an "award" under 33 U. S. C. §933 to make it operate as a statutory assignment of a third-party cause of action?

Statutes Involved

LHCA 33 U.S.C.A. §914 provides in part:

> "Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.
>
> * * * * * * *
>
> (d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.
>
> * * * * *
>
> * * * Mar. 4, 1927, c. 509, § 19, 44 Stat. 1435, as amended June 25, 1938, c. 685, § 9, 52 Stat. 1167; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. * * *"

LHCA 33 U.S.C.A. §919 provides in part:

> "Procedure in respect of claims. (a) Subject to the provisions of section 913 of this chapter a claim for

compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee. * * * "

LHWCA 33 U.S.C.A. §933 provides in part:

"933. Compensation for injuries where third persons are liable. * * *

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

* * * * * *

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all

benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

* * * * *

* * * Mar. 4, 1927, c. 509, §33, 44 Stat. 1440, as amended June 25, 1938, c. 685, §§12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, §3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, §1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat.—* * *"

New York Civil Practice Act, Sec. 13 provides:

"§13. Limitation where cause of action arises outside of the state. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. Where such cause of action, whether originally accrued in favor of a resident or non-resident, arose in a foreign country with which the United States or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by the government of such foreign country, the period between the commencement of the war, or the occupation of such country, and the termination of hostilities with

such country, or the termination of such occupation, is not a part of the time limited in this article for commencing the action; provided, however, that nothing herein or in this article shall apply to or be deemed in any manner to affect any action under section six hundred twenty-five of the banking law against a banking organization or against the superintendent of banks. (Code 390-a. Am. L. 1943 ch. 516, April 15.)"

New York Civil Practice Act, Sec. 19 provides:

"§19. Effect of defendant's absence from state or residence under false name. If, when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

1. While a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.

2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

(Am. L. 1928, ch. 809, Sept. 1; L. 1943, ch. 263, Sept. 1; Code §401.)"

New York Civil Practice Act, Sec. 48 provides in part:

"§48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued;

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article."

New York Civil Practice Act, Sec. 53 provides:

"§53. Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the case of action accrues. (Code §388.)"

N.J.R.S. provides:

"2A:14-22:

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such

corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

Statement

This case involves an affirmance on an appeal of the orders and decrees of three judges of the District Court. Petitioner instituted the present action by a libel in two counts, one for negligence and one for unseaworthiness.

Libelant alleges that on September 6, 1945, he was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, New Jersey, and was loading the SS HOEGH SILVERCLOUD. During lunch hour the carpenters had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on them. The carpenters were not connected with his employer, but were working for a separate carpenter company, the Hamilton Marine Contracting Company (R. 12-19; R. 25-27). This company is covered for liability by Travelers Insurance Company which is also the compensation carrier (R. 26).

The libelant in his affidavit filed in this action stated that he injured his left side, left thigh, left elbow, right leg, and left testicle in this accident. After the compensation carrier's doctor completed treatment and refused to treat him any more he went to other doctors and in August of 1946 his left testicle was removed. He states he has not worked since (R. 26).

The records of the compensation commission show that libelant had filed a claim dated September 27, 1954 (Li. Ex. 1, R. 66A), that an "award" was made on September 28, 1945 (Li. Ex. 2, R. 68), that the report of the employer dated September 6, 1945 (Li. Ex. 3, R. 70A) described the accident: "Man was ascending steps to get over catwalk to #1 hatch. Steps were not fastened and they carried away—man fell and bruised right leg and left thigh."

A notice that the claim would be controverted was filed on September 17, 1945, on behalf of the insurance carrier for the reason that the claimant was "undecided whether or not to sue the third party." A memorandum by the claims examiner states that compensation payments were withheld by the carrier "because of the possibility of the injury having been caused by the negligence of a third party" (Li. Ex. 4, R. 72).

The deposition of Travelers Insurance Company disclosed that in their file in answer to the question "Is the right of subrogation involved?" the answer of "yes" is given (Li. Ex. 7 at p. 7). It also appears from their file that claimant appeared at the insurance company office on September 17, 1945, that he was undecided as to whether he should sue or accept compensation, that he spoke a "broken English," that Hamilton Marine Company and Kerr Steamship Lines were the parties against whom a "subrogation" claim might be asserted.

In the unsigned statement of libelant in the Travelers file appears the following:

> "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I don't want to bother to sue anybody" (Li. Ex. 7 at p. 10).

Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the employers of the carpenters.

In the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945, a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties (R. 19-20).

On December 29, 1952, the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U.S.C. §933(b) (R. 37). [This is a provision of the Longshoremen's and Harbor Workers' Compensation Act, hereafter referred to as the LHWCA.]

The other respondents, SS HOEGH SILVERCLOUD, Oivind Lorentzen as Director of Shipping and Curator of The Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

Section 933(b) of the LHWCA by its assignment provision, as construed by Judge Sugarman, made the said Travelers Insurance Company, in effect, the trustee of the cause of action in which libelant and the said Travelers Insurance Company jointly had an interest.

Because of the conflict of interest of the effective trustee of this action, the libelant appealed to the traditional powers of the court to protect his rights and to do justice, and he made application to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. on the ground that

the true party in interest cannot take advantage of its own default in failing to sue as trustee of the cause of action (R. 38-41).

Furthermore, libelant made application to the court to make the Travelers Insurance Co. a party to this action and to compel Travelers Insurance Co. to sue in its own behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or for an order requiring Travelers Insurance Co. to reassign said cause of action to the libelant because of conflict of interest, and to do justice to the libelant herein.

Judge Goddard denied this motion, holding that the statutory assignment was absolute in the absence of fraud (R. 42-47).

The case then came on to be heard by Judge Ryan who limited the hearing to and dealt solely with the defense of statutory assignment. Judge Ryan decided the case on the ground that the law of the case had been settled by the two opinions rendered heretofore, and he dismissed the libel as to all remaining parties (R. 11).

Libelant appealed from all rulings.

On appeal the Court of Appeals discussed the question of the statutory assignment under 33 U.S.C. §933 which was the only ground considered by the courts below and indicated that it did not agree with the determination on this issue, but stated that the case didn't have to be decided on this issue because the libelant was barred by laches (R. 56-60). This latter ground had not been developed in the District Court.

Libelant petitioned for a rehearing, but the petition was denied (R. 61-64). This court has allowed certiorari (R. 65).

Summary of Argument

1. The cause of action of libelant was not assigned to the libelant's employer and compensation carrier because the alleged "award" was not such an "award" as would effectively transfer the cause of action under Section 933. It was not a final determination. It did not result from a *bona fide* controvertion of libelant's claim, but was the result of withholding libelant's compensation payments for the sole purpose of forcing him to abandon his third party claim to the very insurance carrier who insured the third party responsible for the accident. In addition it did not follow from the regular procedure for an "award" set forth in the LHWCA.

2. If there was a valid assignment, the District Court sitting as a Court of Admiralty should have permitted libelant to implead the compensation carrier and should have made the compensation carrier a party to the action under such protective orders as might be necessary under the circumstances. In the alternative the court could have directed the compensation carrier to reassign the cause of action to libelant on terms it deemed just.

3. The Court of Appeals affirmed the dismissal of the libel on the defense of laches. It did not affirm on the ground of statutory assignment. Since the trial court made no finding as to laches and since laches is a question to be determined after all the evidence is before the court and the equities are weighed and balanced, this deprived libelant of his day in court on this issue.

4. The LHWCA was not intended to deprive longshoremen of their rights against third party tortfeasors. The assignment provisions of this act were only intended to permit the employer of the longshoremen to recoup the payments made under LHWCA where the injury was due

to the acts or omissions of a third party. It was not intended to provide insurance companies with an easy way to deprive longshoremen of their rights against third parties. The courts, giving the LHWCA the liberal interpretation to which it is entitled, should protect the rights of longshoremen in such situations as the present one, applying the broad equitable principles traditionally employed in admiralty.

POINT I

Where a compensation carrier under the LHWCA is the insurer of the third party responsible for an employee's injury, the Court of Admiralty will intervene to protect the interests of the injured employee because of the inablity of the compensation carrier which has a conflict of interest to fulfill its obligation as trustee of the cause of action.

(a) *A court of admiralty applies equitable principles.*

In *Toledo S.S. Co.* v. *Zenith Transportation Co.*, 184 F. 391 (1911) the libelant sought to invalidate an award on the ground that it had revoked its arbitration consent before an award had been made and published. The court rejected the narrow common law view. Among other things Judge Hollister stated at page 399:

> "But this suit is in admiralty, a branch of the law not hampered by the rigid rules of the common law and which deals with causes upon considerations even more elastic than pertain to the broad jurisdiction of Courts of Chancery. * * *"

In *The Kongo*, 155 F. 2d 492 (6 Cir. 1946) cert. den. 329 U.S. 735, 67 S. Ct. 99, 91 L. Ed. 635 (1946), the libelant sought to recover unpaid seamen's wages which he had paid and for which he had assignments. The court held that the libelant could not use a corporate fiction to con-

ceal his own obligation. Among other things Judge Allen stated at page 495:

> " * * * A fraud would result if McBride's representative could collect from third parties the debts which he obligated himself to pay. Such a result would violate the underlying principles of admiralty proceedings, for while admiralty courts do not have general equitable jurisdiction, they have capacity to apply equitable principles in order the better to attain justice. Schoenamsgruber v. Hamburg Line, 294 U.S. 454, 457, 55 S.Ct. 475, 79 L.Ed. 989. Or, as stated by Mr. Justice Story in Brown v. Lull, 4 Fed. Cas. pages 407-409, No. 2,018: 'they (admiralty courts) act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.'"

In *United Fruit Co.* v. *United States*, 186 F. 2d 890 (1 Cir. 1951) it was held that a redelivery certificate which purported to be a receipt for a vessel and a release of claims was not binding under the circumstances in that case. Among other things Chief Judge Magruder stated at page 896:

> " * * * A court of admiralty, in cases within its jurisdiction, proceeds upon equitable principles; and if a release is pleaded in defense against a libel in admiralty on a maritime contract, the admiralty court has power to disallow such a defense where under the circumstances the libelant would be entitled to relief by way of rescission or reformation of the release under accepted equitable principles. * * *"

In *Gardner* v. *Dantzler Lumber & Export Co., Inc.*, 98 F. 2d 479 (5 Cir. 1938) Judge Foster stated at page 479:

> " * * * Indeed, the presumption must be indulged that R. C. Gardner put the legal title of the vessel

in his insolvent brother to avoid liability for possible claims arising from her operation. Courts of admiralty administer the broadest equity and may look through such transactions to ascertain the truth."

See also *Rice* v. *Charles Dreifus Co.*, 96 F. 2d 80, 82 (2 Cir. 1938); *The Salvore*, 36 F. 2d 712, 713 (2 Cir. 1929); *Gaynor* v. *The New Orleans*, 54 F. Supp. 25, 28 (N.D. Calif. 1944).

The fact that admiralty applies equitable principles has been recognized by textbook writers on the subject. 1 Knauth *Benedict on Admiralty* (Sixth Ed. 1940) Sec. 71 and the Supplement thereto (1955); Norris *The Law of Seamen* (1951) Sec. 501; Robinson *Handbook of Admiralty Law* (1939) Sec. 22.

(b) *The carrier for libelant's employer had a special "trust" relationship with libelant with regard to the cause of action arising from libelant's injury.*

Judge Sugarman dismissed the libel as to the respondent Kerr Steamship Company, Inc. on the ground that there had been an effective assignment of libelant's cause of action (R. 35). Judge Goddard refused to strike the defense of Hamilton Marine Contracting Company, Inc. based on the defense of a statutory assignment and refused to make Travelers Insurance Company a party to the action or to require them to reassign the cause of action to libelant (R. 42). Judge Goddard held that only with a showing of "fraud" libelant might have a remedy against Travelers Insurance Company (R. 46). Judge Ryan, following the decisions of his brother judges, dismissed as to remaining respondents on the same ground (R. 53).

The LHWCA specifically recognizes a "trust" relationship in one situation. If the employer makes a recovery on an assigned cause of action against the third-party tortfeasor in excess of his lien and the attorney's fees,

then the deputy commissioner is to compute future benefits and the employer is to retain the amount computed "as a trust fund to pay such compensation" 33 U.S.C. 933(e) (1) (d). This illustrates the nature of the relationship created by an assignment under the LHWCA.

In *United States Fidelity & Guaranty Co. v. United States*, 152 F. 2d 46 (2 Cir. 1945) a longshoreman had been paid compensation by libelant, his employer's compensation carrier, for personal injuries received on respondent's vessel while in the course of his employment. The respondent sought to set aside a decree on several grounds. Among other things it claimed that because it had paid the premiums which had insured plaintiff's employer for liability against workmen's compensation the insurance carrier should not recover. Judge Learned Hand disposed of this contention by saying at page 48:

> " * * * So far as concerns the tortfeasor's liability up to the amount of workmen's compensation, while it may be a good answer as between the employer and himself that the insurance has protected the employer, it is no answer to the insurer, because it ignores his right of subrogation, which is an incident to his contract of insurance. So far as concerns the tortfeasor's liability to the employee beyond the amount of workmen's compensation, no agreement between the tortfeasor and the employer can prejudice the employee, because, although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, *the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.* Certainly he may not in advance release the whole claim upon consideration

that he shall be personally released from his liability for workmen's compensation. * * *" (Italics ours.)

The Court of Appeals in this case sustained the dismissals below on the ground of laches, a ground not determined by the District Court. However, as to libelant's contention that a trust relation existed, Judge Frank, speaking for the court, quoted part of Judge Hand's language set forth above and then stated with respect to this case at (R. 59):

> "The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party."

In the United States District Court, the "trust" theory was rejected on the basis of *Hunt* v. *Bank Line*, 35 F. 2d 136 (4 Cir. 1929) (R. 44).

The *Hunt* case is an early case under the LHWCA. It was decided before Section 933 was amended, clarifying the intent of Congress not to make the rights of an injured employee under the LHWCA and his rights against third parties mutually exclusive. See *Grasso* v. *Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1944), aff'd 149 F. 2d 127 (2 Cir. 1945) cert. den. 326 U.S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

This Court has indicated that the question presented in that case is still an open one. In *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 53 S. Ct. 231, 77 L. Ed. 477 (1933), the plaintiff was the employer's compensation carrier who had paid the employee's widow under an award. The carrier then sued in its own right and also to the use of the widow in her own right and as administratrix. Chief Justice Stone, speaking for the court, stated at page 543:

"Accordingly the employer is the party to bring the action and the only necessary party plaintiff in case before us. But the insurance company and the widow, both in her own right and as administratrix; are interested in the recovery. Under the common-law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. * * * Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have 'an interest * * * in obtaining the relief demanded' we do not decide. * * * Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare Hunt v. Bank Line (C.C.A.), 35 F. (2d) 136; or the insurer * * * in a case where the employer refused to co-operate in the prosecution of the action."

The theory advanced in the *Hunt* case that the employee in accepting compensation, in effect, chose between a remedy against one of 2 joint-tortfeasors is not analogous. The remedy of the employee under the LHWCA is not based on wrongdoing. It arises from the employer-employee contractual relationship. The employee's benefits under the act are generally much less than the damages given in regular tort actions. Cf. *Crab Orchard Imp. Co.* v. *Chesapeake and Ohio Ry. Co.*, 115 F. 2d 277 (4 Cir. 1940), cert. den. 312 U. S. 702, 61 S. Ct. 807, 85 L. Ed. 1135 (1941).

Furthermore, the *Hunt* case disregards the liberal intent of the LHWCA repeatedly announced by this Court. See *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Doleman* v. *Levine*, 295 U. S. 221, 55 S. Ct. 741, 79 L. Ed. 1402

(1935); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408, 52 S. Ct. 187, 76 L. Ed. 366 (1932).

Christon v. United States, 8 F. R. D. 327 (D.C.E.D. Penna. 1947) while brought on the law side of the calendar applied equitable principles in a maritime law case. In that case the injured employee had elected to sue the vessel instead of accepting compensation. The insurance carrier for the employer sought to intervene. The respondent owner of the vessel, had moved to implead the employer on the ground that the employer would be liable to it for any liability found against it in the suit by the employee, which motion was granted. Judge Fitzpatrick then stated at page 328:

> "Now, if the Casualty Company's policy protests Maritime against claims of this nature, the Casualty Company would benefit by keeping the verdict against Maritime down to a figure no higher than the amount of compensation due the plaintiff administratrix under the Longshoremen's Act. It would in any event be liable for the full amount of that compensation. Its interest, to this extent, would be against that of the plaintiff and in accord with that of Maritime and, from this point of view, it should be aligned with the two respondents.
>
> *Obviously the Casualty Company may not take a dual position.* The only way that it might properly be a party plaintiff would be if Maritime were not impleaded and the suit were to proceed against the United States. As the suit stands, its motion to intervene will be denied." (Italics ours.)

Section 933 was not intended to give an unconscionable benefit to the insurance company for the employer. On the contrary, it imposed a trust upon such carriers. In *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545, Chief Judge Cardozo stated at page 546:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rules of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

In *Saco-Lowell Shops* v. *Reynolds*, 141 F. 2d 587 (4 Cir. 1944), Judge Parker in contract licensing case stated at page 597:

> "* * * As said in the case cited, quoting from the note of Judge Hare in 1 Leading Cases in Equity 62: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'"

In the present case the respondent's insurer procured a formal award approximately 3 weeks after libelant's accident. Libelant had no knowledge of the conflict of interest possessed by respondent's insurer (R. 26). He is an ordinary longshoreman who only knew of his own need at the time.

The injustice of the *Hunt* case, where it develops that the employer's insurance carrier is on both sides of the fence, is shocking and runs counter to the most elementary

concepts of fair dealing. The cause of action was assigned to the employer under the LHWCA to enable the employer, who often is without fault, to recoup his losses under the LHWCA occasioned by the act of another. In order to avoid disputes the Act gives the employer a wide range of discretion relative to the third-party cause of action. Normally, we may assume, the employer's self-interest would cause him to act on behalf of himself and his employee. However, when the employer is no longer in a position to do this because those who control the litigation find themselves on both sides of the fence, the employer or his insurer, at the very least, have the duty to inform the employee before he makes an election that he, by taking compensation under an award, is forever renouncing all chance for any further recovery. Even if such notice is given, the very duality of the position of the carrier for the employer should forever estop it from asserting the defense of Section 933?

The compensation carrier did not controvert libelant's claim for compensation because there was any legitimate question concerning libelant's right to compensation at the time. Rather it was for the purpose of compelling the libelant to give up his rights to compensation and medical treatment or his cause of action against third-party tort feasors (Li. Ex. 4, R. 72; Li. Ex. 7 at p. 10). Section 914(a) requires that compensation be paid promptly without an award, "except where liability to pay compensation is controverted by the employer." 33 U. S. C. 914(a). In this case, the insurance carrier did not controvert liability. It merely sought to use the device of a formal award to compel the libelant to assign his cause of action at a time when he was in economic need because of his injury. This is clearly set forth in the memorandum of the claims examiner which is dated September 28, 1945, the date of the award and upon which the respondent relies to show that libelant made an election (Res. Hamilton's Ex. A, R. 74).

(c) A court of admiralty applying equitable principles will protect the interest of a longshoreman in a cause of action he has against a third-party tortfeasor which is held by his employer or his employer's carrier in their joint interest.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, —— U. S. ——, 76 S. Ct. 232, —— L. Ed.—— (1956) this Court held that a third-party tortfeasor could recover from a a stevedore's employer the amount paid for injury to the stevedore on the basis of an implied consensual obligation under certain circumstances. Mr. Justice Black, with the concurrence of the Chief Justice, Mr. Justice Douglas, and Mr. Justice Clark, dissented. Among other things Mr. Justice Black stated at page 243 of the Supreme Court Reporter:

> "* * * Human nature and habits being what they are, employers will not be eager to finance suits against themselves. Injured longshoremen are not ordinarily wealthy enough to support themselves without work pending the trial of lengthy lawsuits. Yet if an employee accepts a compensation award only his employer can bring suit against the third person, and the employer will not be overly anxious to sue himself. *It has been suggested that we can expect the courts to protect employees under such circumstances.* In other words, the employee who has accepted compensation must go into court to protect himself against his employer before he goes into court to protect his claim against a third party who has negligently injured him. I cannot believe Congress would have given employers such complete control over these suits if it had thought the employers could be held liable for everything recovered. * * *" (Italics ours.)

This case is a perfect example of a situation where an employee needs protection. The apparent purpose of Sec-

tion 933 is to give the employer a chance to recoup his losses not to destroy the rights of the injured longshoreman against third-party tortfeasors. Congress apparently assumed that the normal self-interest of the insurance carrier or the employer would be sufficient to entice them to pursue the injured employee's cause of action against third party tortfeasors.

The District Court had power to add the insurance company of the employer and third-party tortfeasor to this action. Rule 15 of the Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provides:

"Rule 15—Substitution of Parties

When by reason of the death or incompetency of any of the parties, changes of interest in the suit, defects in the pleadings or proceeding, or otherwise, new or substituted parties to the suit are necessary or proper, persons, upon their own petition or upon petition of any party to the cause, may be made parties by appropriate order ex parte if no appearance or claim has been filed, otherwise the said application shall be made on notice to all parties who have filed appearance or claims. The order may provide for the issuance of process."

This rule was formerly Rule 18. It is now Rule 12. In *Syville* v. *Waterman S. Corp.*, 84 F. Supp. 718 (S. D. N. Y. 1949), Judge Coxe stated at page 719:

"Under either the Jones Act or the Death on the High Seas Act the personal representative of the deceased seaman is the only person who may maintain an action. * * * Anne cannot, as general guardian, maintain the action, nor can she, as administratrix, her letters

having been revoked, continue further to prosecute it. Elise, by reason of her appointment as administratrix, has succeeded to the rights of Anne as administratrix, and is now the only person who can continue the prosecution of the action, and, despite her objections, she must be made an involuntary libelant. I think that Rule 18 of the Local Admiralty Rules authorizes this. Under ordinary circumstances this relief would seem to be sufficient: But there is evident antagonism between Anne and Elise. However, the rights of the infant children to share in any recovery must be protected. Both Acts provide that the action shall be maintained for the benefit of both the widow and the children. And, under the Death on the High Seas Act, the words 'child, or dependent relative' have been held to include illegitimate children.

* * * Under Local Admiralty Rule 15 persons entitled to participate in the recovery may be admitted to prosecute as co-libelants. I think that under this Rule there is authority to add Anne, as general guardian of her children, as a co-libelant.

The motion is disposed of by directing that Elise, as administratrix, shall file within 20 days a second amended libel in which she shall be the libelant and Anne, as general guardian, co-libelant. In the event that Elise shall fail to do so, Anne, as co-libelant, may file such second amended libel in the names of Elise, as administratrix, libelant, and herself, as general guardian, co-libelant." (Citations omitted.)

Under the local admiralty rules, the District Court, applying equitable principles, could have provided for making the Travelers Insurance Company a party to the action and permitted the action to proceed on terms which would be just to all parties.

POINT II

The United States Court of Appeals should not have affirmed a dimissal on the issue of laches which was not determined by the Court below but should have remanded the case for further proceedings.

Judge Sugarman dismissed the libel as to the respondent Kerr Steamship Company on exceptions on the ground that there had been an effective assignment of libelant's cause of action. He deliberately did not consider the issue of laches (R. 35). Judge Goddard's opinion did not discuss laches either (R. 42). Judge Ryan decided the case on the ground that there had been an assignment, which had been established as the law of the case by his brother judges and therefore he dismissed the libel as to the remaining respondents (R. 11). At no time at the trial level was the case determined on the issues of laches. The trial before Judge Ryan dealt only with the assignment defense and did not go into the factual aspects of laches (R. 2). The Court of Appeals did not decide the assignment issue but instead disposed of the case on the ground of laches, without making any findings of fact concerning laches. The issue should have been determined after a hearing and after all the equities had been appraised and balanced. See *Taylor* v. *Crain*, 195 F. 2d 163, 165 (3 Cir. 1952); *United States* v. *Alex Dussel Iron Works*, 31 F. 2d 535, 536 (5 Cir. 1929); *Rederi A/B Gylee* v. *Sinason and Zeitlin*, —— F. Supp. ——, 1956 A. M. C. 164 (S. D. N. Y. 1955). Furthermore since the issue was not tried by the judges at the trial court level, the matter should have been remanded for further hearing and findings of fact. See *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525, 532, 58 S. Ct. 651, 82 L. Ed. 993 (1938); *Kreste* v. *United States*, 158 F. 2d 575, 580 (2 Cir. 1946); *Jackman* v. *United States*, 54 F. 2d 227 (1 Cir. 1931).

In *Gardner* v. *Panama Railroad Co.*, 432 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31 (1951) this Court stated at page 30:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * *"

See also *Loverich* v. *Warner Co.*, 118 F. 2d 690, 693 (3 Cir. 1941) cert. den. 313 U. S. 577, 61 S. Ct. 1104, 85 L. Ed. 1535 (1940). *The Slingsby*, 120 F. 748 (2 Cir. 1903) cert. den. *Whalley* v. *Travers*, 188 U. S. 741, 23 S. Ct. 844, 47 L. Ed. 678 (1903).

This accident occurred in New Jersey. The suit was instituted in the United States District Court sitting in New York. The courts of the State of New York would normally look to the applicable limitations period of the place where the accident occurred. N. Y. C. P. A. Sec. 13. In New Jersey the limitations period has not run because it has not been established that the respondents are residents or corporations of New Jersey or foreign corporations having any person or officer in New Jersey upon whom process may be served. See R.S. 2A:14-22, formerly R.S. 2:24-7 as am. L. 1949 c. 125 p. 495 § 1; *Kenny* v. *Duro-Test Corporation*, 91 F. Supp. 633 (D. C. N. J.); *Whalen* v. *Young*, 28 N. J. Super. 543, 545, 101 A. 2d 64, 66 (Law Div. 1953) reversed in part on other grounds as to other issues in 15 N. J. 321, 104 A. 2d 678 (1954).

The libel is based both on negligence and on unseaworthiness (R. 12 *et seq.*), the situation is similar to that in the

case *LeGate* v. *The Panamalga*, 221 F. 2d 689 (2 Cir. 1955). In that case libelant was injured on October 16, 1950 while employed as a longshoreman at Galveston, Texas. A libel was filed in New York about 3 years and 5 months later. The case was dismissed on the ground of laches on exceptions to the libel. Judge Burke, speaking for the Court of Appeals reversed and remanded the case, stating in part at page 690:

> "* * * The claim based upon negligence may not be barred under the Texas statute, because of the absence of the respondents from Texas. * * *"

Then at page 69; he stated:

> "Section 48, C. P. A. deals with actions which must be commenced within six years after the cause of action has accrued. Subdivision 3 thereof reads 'An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.' The only other express provision for a personal injury action is Section 49(6) relating to actions based on negligence. We hold therefore that as to the claim based on unseaworthiness the six-year statute, Section 48(3), C. P. A. is the analogous statute which should be considered in determining laches.
>
> We are not disposed however to mechanically apply the analogous state statutes of limitations without regard to the equities. See Gardner v. Panama Railroad Co., 342 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31. A rigid application would call for affirmance of the judgment in so far as it disposed of the claim based on negligence. Since we must reverse for the error in dismissing the claim based on unseaworthiness we think it would be a harsh result to permit the suit to continue and at the same time limit its scope. Accordingly we

reverse the judgment appealed from. We remand the case to the District Court with a direction to reconsider the question of laches, placing the burden on the respondents to show inexcusable delay in filing the suit with resulting prejudice to the respondents."

The respondent's vessel had been within the jurisdiction of the United States District Court, Southern District of New York once in 1946, twice in 1947, once in 1948, twice in 1950, and twice in 1951 (R. 32). Under N. Y. C. P. A. Sec. 19, an absence from the state of more than four months tolls the limitations period. Therefore it would appear that the analogous limitations period has never run as to the vessel. Libelant alleged in the libel that respondent Olvind Lorentzen, a citizen of Norway, had an office and place of business in New York. This respondent never filed an answer but did file exceptions (R. 51). The record does not disclose whether or not this respondent was present within the jurisdiction for a sufficient period of time for the analogous limitation period to have run as to him either. N. Y. C. P. A. Sec. 53 provides that where no other limitations period applies the limitations period is 10 years. *Pitcher* v. *Sutton*, 238 App. Div. 291, 264 N. Y. S. 488 (App. Div. 1933) aff'd 264 N. Y. 638, 191 N. E. 603 (1934).

After Judge Sugarman on the exceptions of respondent Kerr Steamship Company, Inc. held that libelant was not a proper party because his cause of action had been assigned to libelant's employer Northern Dock Co. and Travelers Insurance Company as the compensation carrier, libelant moved to add the Travelers Insurance Company as a party libelant, or to require the Travelers Insurance Company to reassign the cause of action to libelant. In addition libelant asked that the defense of assignment by respondent

Hamilton Marine Contracting Company, Inc. be dismissed on the ground that Travelers Insurance Company insured respondent Hamilton Marine Contracting Co. and was the true party in interest and should not be permitted to take advantage of its position as trustee of the cause of action which it held for itself and libelant (R. 38). This is essentially a request for equitable relief, and consequently would be governed by the ten year limitations period.

Furthermore it is possible that if the vessel and its owners were held liable the Travelers Insurance Company would be required to pay the full judgment. See *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corporation*, —— U. S. ——, 76 S. Ct. 232, —— L. Ed. —— (1956). The steps which were not fastened or secured and on which libelant was injured were put up by the employees of respondent Hamilton Marine Contracting Company (R. 25). This is the company insured for liability by the same Travelers Insurance Company.

This insurance carrier should not be permitted to benefit from its own failure to pursue the cause of action which it held as trustee for itself and the libelant.

In *McDaniel* v. *Gulf & South American Steamship Co.*, 228 F. 2d 189 (5 Cir. 1955) a longshoreman's libel was dismissed on exceptions. The dismissal was based on laches, the libel having been filed over four years from the date of accident, and over two years after the analogous state limitations period had expired. On appeal the case was reversed and remanded. Among other things Judge Cameron stated at page 191:

> "Courts of admiralty which act upon principles of equity are not bound by the applicable statutory limitations governing the bringing of actions at law in local courts to make a mechanical application of such

statutes but, by analogy, they will generally be guided by such statutory periods. The lapse or nonlapse of the statutory period of limitations is not, of itself, decisive, but is only one of various factors to be taken into consideration by the court. No arbitrary or fixed period of time will be established as an inflexible rule, but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. * * * "

Then at page 193 he stated:

"It is clear, moreover, that the libel avers that appellee has not been prejudiced by the delay. It is argued that prejudice would inevitably follow a delay such as is reflected here. We do not agree. As a practical proposition we know that a serious accident of the sort described in the libel would be fully investigated by the average person and no circumstance is suggested which would lead to the assumption that the usual procedure was not followed here. * * * "

The Travelers Insurance Company investigated this accident promptly. Its own files indicate that there was third-party liability. The basic facts concerning the accident are not seriously in dispute on the basis of their own records. Libelant's medical history is likewise a matter of record. It does not appear at the present time that respondents will be any worse off than they would have been two, four, or even six years ago with respect to proof on medical issues.

The Court of Appeals should have remanded the case for trial. Only after full trial when all the evidence is before the court, can there be a determination that respondents or any of them were prejudiced by the mere passage of time.

POINT III.

There was no award made within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 933(b) and therefore there was no assignment of the libelant's cause of action to his employer or his employer's insurance company.

Section 933(b) of the LHWCA provides for assignment of a cause of action against a third party to an employer where there is acceptance of compensation "under an award in a compensation order filed by a deputy commissioner." Prior to 1938 the mere acceptance of compensation with or without an award operated as an assignment. See *Grasso v. Lorentzen*, 56 F. Supp. 51 (S. D. 1944); 149 F. 2d 127 (2 Cir. 1945) cert. den. 326 U. S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

In *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947), the court stated at page 455:

> "Congress has provided that unless an employer controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue; save the general limitation of one year option. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think

that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor."

As stated by Justice Reed, the purpose of the amendment was to avoid pressuring a claimant into accepting an award while he was in need. Limiting the assignment provision to the situation where there is an "award" therefore must have a special significance in line with the intent of Congress. What, then, is an "award"?

An award is an order of a Deputy Commissioner made on a claim, after a hearing where a hearing is ordered, if requested, and if no hearing is ordered, then 20 days after notice is given to the employer. 33 U. S. C. A. §919 sets forth the only procedure by which an "award" is entered.

In the present action the claim was filed September 27, 1945 (Li. Ex. 1, R. 66A), notice to the employer is dated September 28, 1945 (Li. Ex. 3, R. 72), and the order with the alleged "award" is dated September 28, 1945 (Li. Ex. 2, R. 69). Therefore the order was not an "award" but was merely an order. There had been no hearing and no 20 day period had elapsed from the date notice had been given to the employer. The failure to follow the statutory requirements resulted in denying the order the dignity of an "award." In *American Mutual Liability Insurance Co.* v. *Lowe*, 13 F. Supp. 906 (D. C. N. J. 1936) the claimant had received an alleged award on May 3, 1932. Over 2 years later claimant moved for an additional award which was granted. The claim was made that the award of May 3, 1932 had disposed of claimant's rights. Judge Fake stated at page 906:

"The action before the deputy commissioner proceeded under section 21 of the aforesaid Act (U. S. C. title 33, §921 (33 U. S. C. A. §921)) which provides: (a)

was brought against the respondents. On July 29, 1952, exceptions and exceptive allegations were filed on behalf of Kerr Steamship Co., Inc. on the grounds of (1) petitioner's laches, and (2) because he had received a formal compensation award and was an improper party to bring suit, the case having been assigned to his employer by Section 933(b) of Title 33 U. S. C. At the time of the argument of these exceptions and exceptive allegations before the Honorable Sidney Sugarman, the entire compensation file was subpoenaed from the Commission. Included within the file are all the papers marked exhibits herein and in addition a letter of September 25, 1945 from Claims Examiner, O'Keefe, to the petitioner explaining his rights. This is made a part of the appendix to this brief (pp. 1a-5a).

By memorandum of law filed with the Court at the time of the argument of the exceptions and exceptive allegations, the question was also raised that the formal compensation award of September 28, 1945 was final insofar as judicial review was possible since more than thirty days had elapsed since its filing citing 33 U. S. C. Sec. 921(a), (b) and (d). After hearing argument on the exceptions, Judge Sugarman handed down a memorandum opinion (Petitioner's Appendix, p. 1a), sustaining the exceptions based on the formal award. Meanwhile, the time of the respondent, The Norwegian Shipping and Trade Mission, to answer was kept open by stipulation. Subsequently petitioner moved for further relief seeking (1) to strike the defense of Hamilton Marine Contracting Company, Inc., that an assignment had been made, or (2) to add the Travelers Insurance Company as a party, or (3) to order Travelers Insurance Company to assign the cause of action back to petitioner. In an opinion filed by Judge Henry W. Goddard November 30, 1953, the motion was denied in all respects (Petitioner's Appendix, p. 6a).

Subsequently, it was agreed that all parties would appear before the Court for hearing as to whether or not the case

would be dismissed as to The Norwegian Shipping and Trade Mission and Hamilton Marine Contracting Co., Inc. on the same grounds that it was dismissed as to Kerr Steamship by Judge Sugarman, to wit, that there had been an award and assignment of the claim to petitioner's employer. After a hearing Judge Ryan followed the decision of Judge Sugarman of December 11, 1952 and dismissed the libel as to the two remaining parties.

In its opinion dated May 23, 1955 the Court of Appeals affirmed the dismissal of the libel. Petition for a rehearing was made and on June 14, 1955 denied.

There is no claim that either The Norwegian Shipping and Trade Mission or Kerr Steamship Company, Inc. is in any way associated with the Northern Dock Company, the Travelers Insurance Company or Hamilton Marine Contracting Co., Inc.

ARGUMENT

1. This Court has no jurisdiction to review the compensation order or award.

In so far as the petition attacks the award or compensation order of September 28, 1945, said attack is collateral and neither the District Court, the Court of Appeals nor this Court has any jurisdiction to review said award.

Section 921(a) and (b) of Title 33 are specific as to the procedure to be followed for review. Suit is to be commenced in the District Court where the accident occurred (New Jersey, not New York), within 30 days after the filing of the compensation order and shall be brought against the Deputy Commissioner. None of these requisites have been followed.

Section 921(b) expressly provides that this is the exclusive method of review.

The courts have construed this statute strictly.

Crowell v. *Benson*, 285 U. S. 22, 63.
Associated Indemnity Corporation v. *Marshall*, 71 F. (2d) 235, 236 (9th Circuit).
Shugard v. *Hoage*, 89 F. (2d) 796, 797, 798. (Court of Appeals, District of Columbia.)

Failure to proceed according to the statute, in any particular is a jurisdictional defect in any other proceeding.

Hagens v. *United Fruit Co.*, 135 F. (2d) 842. (Failure to sue Deputy Commissioner.)
Mille v. *McManigal*, 69 F. (2d) 644. (Failure to sue within 30 days.)
Bassett v. *Massman Construction Co.*, 120 F. (2d) 230. (Suit in wrong district.)

2. Petitioner has no standing in this Court or any Court to sue for personal injuries as his cause of action was assigned to his employer by the compensation order of September 28, 1945.

Both the District Court in the opinion of District Judge Sugarman and the Court of Appeals in the opinion by Judge Frank have held that there was an award and a consequent assignment of the cause of action to petitioner's employer and rejected petitioner's argument as to procedural defects in the award. Judge Frank said in the opinion of the Court of Appeals, after holding that the statute provided the exclusive method of securing judicial review of an award:

> "Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit."

Petitioner does not show in any way or degree wherein either the District Court or the Court of Appeals was in error in holding the award to be proper. He merely poses an inquiry to this Court as to what an award is with-

out seriously questioning the validity of the award or indeed arguing the point either way. Inasmuch as there has been an award and that award has been upheld by two courts, petitioner's cause of action, by virtue of 33 U. S. C., 933(b), was assigned on September 28, 1945 to petitioner's employer, and by subrogation under 33 U. S. C. 933(i), to petitioner's employer's insurance carrier.

Since September 28, 1945, therefore, the within action for personal injuries has belonged to either Northern Dock Company or the Travelers Insurance Company. When petitioner sued the vessel and the three respondents herein on June 12, 1952, he was legally disabled from doing so and despite all the activity in the case since that date he is still so disabled. Consequently, there is and can be no controversy between the parties to the above action as to liability for petitioner's personal injuries.

3. Neither the lower courts nor this Court has any power to rule on questions adversely affecting persons not parties to this suit.

Neither the petitioner's employer, Northern Dock Company, nor the Travelers Insurance Company are parties to this suit, yet petitioner seeks to have either or both reassign the cause of action for personal injuries (previously assigned to the employer by the award of September 28, 1945) to him or to compel either or both of said companies to act as trustee for the purpose of prosecution of his claim for personal injuries. Such relief would be repugnant to due process.

Petitioner has mistaken his remedy. Any relief against Northern Dock or the Travelers should be made the subject of a new and separate proceeding against these parties. Petitioner has erroneously annexed his request for such relief to this usurped cause of action for personal injuries.

4. Petitioner's laches has prevented him from obtaining any of the relief he seeks.

The issue of laches is not the laches of petitioner in commencing the suit at bar, for in truth, petitioner could not be guilty of laches in commencing a personal injury suit to which he had no legal right. The real issue here is petitioner's failure not only to pursue his remedy for judicial review of an administrative award under 33 U. S. C. Section 921, but petitioner's laches in making claim for the first time on October 30, 1953 against the Northern Dock Company and the Travelers Insurance Company. This was over eight years after the award and sixteen months after the filing of the libel for personal injuries on June 12, 1952.

Consequently, whether petitioner brought this action for personal injuries within any statute for negligence or unseaworthiness, is wholly irrelevant, for petitioner had no cause of action to bring. The issue, as indicated, is whether he raised his request for relief against the Northern Dock Company and the Travelers Insurance Company in time. As shown in Point 3, that question should be resolved in a proceeding brought against those parties for the relief asserted and not in this action for personal injuries.

On the record, however, petitioner's laches is manifest. The award was made September 28, 1945. The action for personal injuries was commenced June 12, 1952. Not until October 30, 1953 did petitioner for the first time raise the point that the Travelers Insurance Company or the Northern Dock Company was a trustee or requested the relief of reassignment of the cause of action. Under the circumstances and without any plea before the Court of Appeals for an opportunity to excuse his delay, the Court of Appeals was quite justified in deciding on the equities that petitioner had slept on his rights after so long a period. It was not until reargument before the Court of Appeals that petitioner sought to plead facts excusing his delay and

showing lack of prejudice to the respondents, and even at that late date and even before this Court on this petition, petitioner has not enumerated what these exceptional circumstances might be. Seeking very broad equity relief petitioner should not trifle with this Court or the lower courts in asking for opportunities to excuse his laches without presenting those explanations to both the Court of Appeals and this Court.

5. There is nothing, no justification in the opinions below, in case law, the Longshoremen's Act or any practical administration thereof for the broad relief petitioner seeks.

Even assuming that petitioner may reach this Court on a cause of action which does not belong to him and which is not for the equity relief sought against Northern Dock Company and the Travelers Insurance Company, and even assuming that relief may be granted petitioner against persons not parties to this proceeding, and even assuming that petitioner has not been guilty of laches, the question of whether or not there can be a reassignment is not before this Court, nor is the question before this Court of any trustee relationship between petitioner and Northern Dock Company or the Travelers Insurance Company. The Court of Appeals in its opinion and contrary to petitioner's contention expressly did not decide the point, saying on page 20-a of petitioner's Appendix:

> "We do not, however, need to decide this issue, for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovering from a third party."

Even assuming that this was not a dicta, there is nothing in the Longshoremen's Act to support petitioner's plea for such relief. Such relief should not be granted apart from the Longshoremen's Act. Other Courts of Appeal have felt

themselves completely circumscribed by the provisions of the Longshoremen's Act.

In *Associated Indemnity Corporation* v. *Marshall*, 71 F. (2d) 235 (1934) Ninth Circuit, discussing Section 921 (b) as a form of appeal the Court said (p. 236):

> "* * * Although in form not an appeal, a proceeding to set aside the award is somewhat analogous to an appeal; * * *. * * * Appellants argue, however, that since these proceedings are in equity, and are not attacks on decrees or judgments of a court, the chancellor exercising the flexible powers of equity should do full and not partial justice. But the remedial powers of the court are only those which are conferred by the statute and are strictly confined to the suspension or setting aside of the order."

The Court of Appeals for the District of Columbia employed similar reasoning and language in rejecting an appeal to its equity powers in *Shugard* v. *Hodge*, 89 F. (2d) 796 (1937), where the claimant had moved against the award believing himself to be permanently totally disabled instead of, as the Deputy Commissioner found, temporarily totally disabled, claiming also that he was not represented by counsel. The Court said that the lower court was without jurisdiction to hear and determine the case, because suit was not begun until more than thirty days after the award became final. The Court went on to say (pp. 797-798):

> "Although the appellant does not deny the application of these principles of the law in relation to the case, he urges the court to apply broad and liberal principles of equity to the case in order to save him from the consequences of delays for which he does not feel responsible. * * *
>
> It is with regret that we fail to find any authority for such a course. The right which the appellant seeks is of statutory origin and definition, and the granting of it is limited and restricted by statutory rules. The provisions relating to the time within which the claimant

> shall present and prosecute his claim are essential parts of the procedure. The court accordingly cannot revive a claim when barred by the limitations contained in the act."

As a practical matter, the granting of such relief would be unworkable because it would replace the assignee's judgment with that of the Court. In the instant case it is clear that after almost ten years since the accident occurred, neither the employer nor the carrier have any interest in commencing an action against any of the respondents. They may reason, as indeed the compensation doctors found, that the injuries were trivial, and it would be uneconomical to commence suit. They may reason that liability could not successfully be established in this case. They may now feel that as to The Norwegian Shipping and Trade Mission and Kerr Steamship Company, who have no connection or relationship with petitioner's employer, Northern Dock Company, respondent Hamilton Marine Company, or The Travelers Insurance Company, that petitioner's laches or their own laches would preclude bringing any action. They may, indeed, as petitioner contends, have taken advantage of the provisions of the Act. In doing so, however, they are doing no more than this Court suggested an employer might do to protect itself against third party suits, when in the case of *American Stevedores* v. *Porello*, 330 U. S. 446, this Court, in referring to American Stevedores, Inc., commented:

> "* * * American, in the usual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way it would probably have forced an award and the consequent assignment of the right of action to itself" (p. 455).

Consequently, if Northern Dock Company and its carrier "forced" an award here, they did no more than the statute permits and, as the Supreme Court suggests, is permissible.

Petitioner's whole argument is erroneously pervaded with the notion that a decision to accept compensation under an Act provided by Congress for the longshoremen's benefit is one detrimental to the longshoremen's interests.

6. Characteristics of an award.

Petitioner asks this Court to define for him what an award is. The Court of Appeals and the District Court have already answered his question and Title 33 U. S. C. Section 919, contains the complete procedure for obtaining an award.

CONCLUSION

The petition for certiorari should be denied because petitioner has brought the wrong proceeding against the wrong parties at the wrong time.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Respondents,
The S/S Hoegh Silvercloud,
Oivind Lorentzen and Kerr
Steamship Company, Inc.

FRANCIS X. BYRN,
On the Brief.

Libelant's Exhibit 2. 1

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

SECOND COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. BLAZEY CZAPLICKI, Claimant, against NORTHERN DOCK COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier.	Compensation Order Award of Compensation 2 Case No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

FINDINGS OF FACT: 3

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation

Libelant's Exhibit 2.

under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud" which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach a catwalk leading to a hatch, the steps gave way and he fell about five feet in consequence of which he sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at $22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to $45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

AWARD:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at $22.50 per week for temporary total disability from September

14, 1945 to September 27, 1945, inclusive, in the amount of $45.00, and shall continue payments thereafter in bi-weekly installments at $22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 641 Washington Street, New York City, this 28th day of September, 1945.

LOUIS G. SCHWARTZ
Deputy Commissioner
Second Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Blazey Czaplicki, 259 4th Street, Jersey City, N. J.
Northern Dock Company, Pier 3, River Street, Hoboken, N. J.
Travelers Insurance Company, 60 Park Place, Newark, N. J.

D. B. O'KEEFE,
Claims Examiner.

Mailed September 28, 1945.

10

Respondent Hamilton's Exhibit A

MEMORANDUM FOR THE FILE

September 28, 1945

Re: Blazey Czaplicki — File #65-438
Northern Dock Co.
Inj. 9/6/45

Compensation payments have been withheld in this case by the carrier because of the possibility of the injury having been caused by the negligence of a third party.

11 The claimant called on September 27, 1945, and the provisions of Section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

He filed a Claim for Compensation and a formal order will be issued accordingly.

D. B. O'KEEFE,
Claims Examiner.

DBO/ERC

12

Letter of September 25, 1945, from Claims Examiner O'Keefe to Petitioner. 13

65-438

Carrier's No. B-5981165
September 25, 1945.

Mr. Blazey Czaplicki,
259 4th Street,
Jersey City, N. J.

Re: Blazey Czaplicki
Northern Dock Co.
Inj. 9/6/45

Dear Sir:

Your employer's insurance carrier has advised this office that compensation payments are being withheld in your case pending election to take compensation or to sue a third party. 14

If you intend to accept compensation, you should file a claim on the enclosed form U.S.-203 and a formal order will be issued. Section 33(b) of the Act provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

If, on the other hand you elect to sue the third party, you should file an Election to Sue on the enclosed form U.S.-213 in order to protect your future interests in the event that you should be unable to recover from the third party the amount that you would be entitled to under the Compensation Act. 15

Very truly yours,

D. B. O'Keefe,
Claims Examiner.

DBO/ERC
Enc.

'A compensation order shall become effective when filed in the office of the deputy Commissioner as provided in section 919 of this chapter.' The alleged award of May 3, 1932, was not filed in conformity with the aforesaid statute; hence it did not become effective as an award. In the absence of fraud, the conduct of the parties in their subsequent dealings cannot supplant the statutory requirement of filing so as to make a compensation order effective as against the rights of claimant here, since the object and spirit of the act indicate that it should be construed liberally toward the claimant when to do so would not conflict with sound logic. Again, the Compensation Act (U. S. C. title 33, section 919, subd. (e), 33 U. S. C. A. 919 (e), provides that a copy of the award 'shall be sent by registered mail to the claimant and to the employer at the last known address of each.' This was not done as to the alleged award of May 3, 1932. It follows, therefore, that the document did not take on the dignity of an effective award. * * *"

This decision was affirmed in 85 F. 2d 625 (3 Cir., 1936).

Secondly the alleged "award" does not have the element of "finality." It is at most an intermediate order. It merely provides for payments for the continuing "temporary total disability."

In the file of the Compensation Commission there is a form letter dated December 5, 1945, three months after the accident in which libelant was advised that the medical reports filed with the commission indicated libelant had no further disability. On this letter appeared the notation written in (R. 74):

"CP. 3/11. Says working only a day or two a week pain left hip."

This letter and the notation as well as the language of the order of September 28, 1945, establish that the order with the alleged "award" dated September 28, 1945 was little more than a temporary or interlocutory order which awaited the completion of treatment before the claimant's rights could be finally determined. As Justice Reed pointed out, the purpose of Congress in amending 33 U. S. C. A. §933(b) and limiting its operation to an "award" was to give the injured longshoreman time to think and to avoid the force of the very economic pressure which was applied here to make libelant decide at a time when he was in no position to make a choice.

Therefore, while libelant does not attack the proceedings in the commission directly or collaterally, he does raise the issue whether or not the order of September 28, 1945 contained an "award" within the meaning of 33 U. S. C. A. §933(b) so as to constitute an assignment. Based upon the failure to meet the provisions of 33 U. S. C. A. §919, which sets up the procedure for the making of an "award," the lack of finality in the alleged "award," and the Congressional purpose in amending 33 U. S. C. A. §933(b), libelant contends that no such "award" was entered in this case, and therefore no assignment occurred.

The "award" did not constitute such an "award" as would assign libelant's cause of action for the reasons stated above. However even if it is held to have caused such an assignment, the liberal interpretation of the LHWCA, the trust relationship created between the employer and employee by the assignment in the libelant's cause of action and the equitable concepts applied in admiralty require the court to afford some protection to the injured employee to protect his interest in his cause of action against the third-party tortfeasors.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment and decree of the court below should be reversed, and the case remanded for trial.

Respectfully submitted,

NATHAN BAKER
Of counsel and Proctor for Petitioner.

BAKER, GARBER & CHAZEN, Esqs.
Of Counsel

BERNARD CHAZEN, Esq.
On the Brief

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 342

BLAZEY CZAPLICKI,

Petitioner,

against

THE S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture,

OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC.,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS S/S HOEGH SILVERCLOUD, OIVIND LORENTZEN, ETC., AND KERR STEAMSHIP COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. ESTABROOK,
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Oivind Lorentzen and Kerr
Steamship Company, Inc.

FRANCIS X. BYRN,
On the Brief.

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Opinions of the Court Below

The petition sets forth the citations of the various opinions but does not include the citation of the opinion of the Court of Appeals for the Second Circuit which is 222 F. 2d 189, and this is reported unofficially, 1955 A. M. C. 1192.

Jurisdiction

1. In so far as the petition purports to attack a compensation award made September 28, 1945, by Louis G. Schwartz, Deputy Commissioner of the Second Compensation District, of the United States Employees' Compensation Commission (Appendix, p. 1a), neither the District Court nor the Court of Appeals nor this Court has any jurisdiction over this matter because of the specific and exclusive provisions for review found in Title 33, U. S. C. Sec. 921, subdivisions (a), (b) and (d).

2. If the petition does not purport to attack the award of September 28, 1945, then petitioner has no standing in this Court, because under Title 33, U. S. C. Sec. 933(b), any cause of action petitioner might have had for personal injuries against respondents was assigned to his employer as of September 28, 1945, and, consequently, petitioner is legally incapable of bringing this present action, and both the District Court and the Court of Appeals have so held.

3. In part the relief petitioner has sought seeks to make petitioner's employer, the Northern Dock Company, and/or petitioner's employer's underwriter, The Travelers Insurance Company, a trustee to prosecute this action in his behalf, and also seeks, in the alternative, that the cause of action be re-assigned to him. Neither the Northern Dock Company nor The Travelers Insurance Company are a party to this action, and there is a serious jurisdictional question as to what affirmative relief might be granted by this Court, or any Court, by way of mandatory injunction or imposition of a trust on a party not sued for that relief.

All these questions must be resolved favorably to petitioner before petitioner's first question presented for review is reached.

Questions Presented

1. Whether this Court has jurisdiction to review a compensation order or award where the exclusive statutory provisions for review both as to time, venue and parties sued, have not been followed.

2. Whether petitioner has any standing in this Court where his cause of action was assigned to his employer.

3. Whether this Court can give petitioner relief as against persons not parties to this action.

4. Whether petitioner's laches has not precluded him from obtaining any of the relief he seeks.

5. Whether or not, under petitioner's Questions Two and Three, relief can be afforded either under the Longshoremen's Compensation Act or apart from it.

6. Whether, under petitioner's Fourth Question presented for review, petitioner is not adequately answered by the opinion of the Court of Appeals and the language of the Longshoremen's Act, particularly Title 33 U. S. C., Section 919, cited in the petition.

Statutes Involved

The provisions of Title 33, U. S. C. 933 (b) and 33 U. S. C. 919 are set forth in the petition. Title 33 U. S. C. 921(a), (b) and (d) are set forth herein.

> "Sec. 921. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order

are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

Statement

Petitioner, a longshoreman, filed a libel in admiralty on June 12, 1952 to recover damages for personal injuries allegedly sustained on September 6, 1945 while working aboard the s/s Hoegh Silvercloud at Pier 3, Hoboken, New Jersey. His employer was Northern Dock Company. It is claimed that petitioner fell down a catwalk on the deck of the s/s Hoegh Silvercloud, which was erected by respondent, Hamilton Marine Contracting Co., Inc. At the time of the accident, the vessel was owned by Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government doing business under the name and style of The Norwegian Shipping and Trade Mission. Kerr Steamship Co., Inc. acted as agents for the vessel at that time. Hamilton Marine Contracting Co., Inc. was engaged to do certain carpenter work aboard the vessel.

Following the accident, petitioner's employer, Northern Dock Company, filed a report of accident at the Compensation Commission, September 6, 1945 (Libelant's Exhibit

3). Subsequently, The Travelers Insurance Company, the compensation carrier for petitioner's employer, filed a notice with the Commission dated September 13, 1945 that the claim of petitioner would be controverted (Libelant's Exhibit 4). According to respondent Hamilton's Exhibit A in evidence, which was a memorandum prepared by Mr. D. B. O'Keefe, claims examiner, petitioner called at the Commission on September 27, 1945 and the provisions of Section 33b of the Longshoremen's Act were explained to him (Appendix, p. 4a). According to the memo, petitioner stated definitely that he desired to receive his compensation, and to waive any rights to the third-party action, and that he did not desire to consult an attorney in the matter. The memo further said that petitioner filed a claim for compensation and a formal order would be issued accordingly. Libelant's Exhibit 1, dated September 27, 1945, shows that a claim for compensation was filed by petitioner. Libelant's Exhibit 2 is the Compensation Award issued on September 28, 1945 by Deputy Commissioner, Louis G. Schwartz (Appendix, p. 1a). Said exhibit also shows that said award was sent by registered mail to all parties on September 28, 1945. The award provided that petitioner receive compensation for two weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945 inclusive, and thereafter until disability ceased. Under the award petitioner received compensation for 7 weeks and 1 day or a total of $160.72.

On April 30, 1946 petitioner commenced a third-party suit against respondent, Kerr Steamship Company, Inc., in New Jersey in the Hudson County Court of Common Pleas to recover damages for his injuries. The suit was dismissed on November 22, 1946 for improper service of process on Kerr Steamship Co., Inc. A second suit was commenced at a later date but petitioner has asserted it was both commenced and discontinued without his consent. The discontinuance was dated November 26, 1947. Nothing further happened until June 12, 1952, when the present suit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

BLAZEY CZAPLICKI,

Petitioner,

vs.

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING AND TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC.

BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PATRICK E. GIBBONS,
On the Brief.

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BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The petitioner, a longshoreman employed by Northern Dock Co., was injured in the course of his employment on September 6, 1945. On the same day his employer filed with the Federal Compensation Commission a report of his accident (Libelant's Exhibit 3). On September 17, 1945, the libelant called at the office of The Travelers Insurance Company, the insurance carrier for his employer, to discuss his rights, and told the company that he was undecided whether to take compensation or to sue the third-party. On the same day the Travelers Insurance Company filed a notice with the compensation commission notifying them that the claim was controverted because

the injured party was undecided as to whether he would accept compensation or sue the third-party (Libelant's Exhibit 4). On September 27, 1945, the libelant, at the request of the Compensation Commission, called at its office and the provisions of Section 33 (b) of the Longshoremen's and Harbor Workers' Act were explained to him. He then stated that he wished to receive compensation and to waive any rights to his third-party action, and filed a claim for compensation (Libelant's Exhibit 1; Respondent Hamilton's Exhibit A). On September 28, 1945, a formal order and award of compensation to the libelant was made and filed, and copies were served on the libelant and on the employer and its carrier (Libelant's Exhibit 2).

It was conceded at the hearing before Judge Ryan that compensation was paid pursuant to that award, and accepted by the libelant. It was further admitted on the hearing before Judge Ryan that the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the compensation act. The total compensation paid was $160.72, which, through a typographical error, is stated to be $16,072, in the opinion of the Court of Appeals.

On April 30, 1946, the libelant commenced a third-party suit in his own name against the respondent, Kerr Steamship Company, Inc., in the Hudson County Court of Common Pleas, in the State of New Jersey. The action was dismissed for failure properly to serve the defendant. An action was then commenced in the Supreme Court, New York County, which was later discontinued. The present action was instituted on June 12, 1952, seven years after the plaintiff was injured.

The respondents, Silvercloud, Gjvind Lorentzen, and Kerr Steamship Company, Inc., filed exceptions to the libel, alleging that the libelant was not a proper party because his cause of action had been assigned to his employer

by virtue of the statute; the respondent, Hamilton Marine Contracting Company, Inc., served an answer in which the same plea was alleged as a complete defense. All respondents pleaded that the cause of action was barred because of laches. The latter plea was not disposed of in the District Court, the libel having been dismissed on the sole ground that the libelant was not a proper party to the litigation. The Court of Appeals affirmed the dismissal on the ground of laches. It discussed, but did not pass upon, the question as to whether the cause of action had been assigned by virtue of the statute.

POINT I

The assignment resulting by operation of Title 33 U. S. C. A., Sec. 933 (b) is, in the absence of fraud, absolute, vesting in the employer or the insurance carrier complete control of the cause of action against the negligent third-party until a recovery is had either by settlement or after a trial.

Acceptance of compensation under an award in an order filed by the deputy commissioner operates as a binding election, divesting the claimant of his cause of action against the third-party and vesting that cause in the employer or insurance carrier. The election may be set aside on equitable grounds only if fraud is practiced on the injured workman by his employer or by his employer's carrier. In this case fraud was neither claimed nor proved. The petitioner, therefore, had no cause of action on which to sue when he instituted this litigation, and the dismissals by the three judges in the District Court, and the subsequent affirmance by the Court of Appeals, were entirely proper.

The pertinent provisions of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. A., in actual language and clear intent, sustain those dismissals. The provisions read:

"§ 933. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. * * *

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain * * * (2) The employer shall pay any excess to the person entitled to compensation or to the representative. * * *

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

It is to be noted that by virtue of subdivision (b) it is acceptance of compensation under an award in an order filed by the commissioner which constitutes the binding election and divests the claimant of his cause of action. As the act was first written, payment of compensation by the employer, and its acceptance by the injured employee,

constituted the election. This led to disputes as to whether a binding election had been made, or whether the employee had accepted compensation without knowledge of his rights. (*Cf. Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. 2d 847, 850.) To avoid such disputes the section was amended to its present form in which acceptance of compensation under an award constitutes a binding election. There is no room left for claims that the election was made by the injured workman in ignorance of his rights. In the proceedings leading to the award the workman is apprised of his rights, as the petitioner was in this case, and he is then free to choose whether to sue or to accept compensation.

It has never been suggested in any case that a binding election once made does not divest the employee of his cause of action and with it his control over that cause. (*Hunt* v. *Bank Line*, 35 F. 2d 136; *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. 2d 847; *Moore* v. *Hechinger*, 127 F. 2d 746; *Christiansen* v. *United States*, 194 F. 2d 978.) These decisions are at one in approving the analysis of the situation outlined in *Hunt* v. *Bank Line, supra*:

> "When all of these sections are considered together, it is clear that the intention of the act is to require the employee who claims to have been injured by the negligence of a third person to elect whether he will accept compensation under the act or proceed against such third person. If he elects to receive compensation, his cause of action is transferred, and he has no other or further interest therein, unless the employer recovers more than enough to reimburse him for the compensation paid, with costs and expenses, in which event the excess belongs to the employee. * * * He can elect which course he will follow, but he cannot follow both. * * * It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who

is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises, and this is given by the statute to the employee not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

This Court has expressed similar views in its decisions in *Doleman* v. *Levine*, 295 U. S. 221, and *Aetna Life Insurance Co.* v. *Moses*, 287 U. S. 530, which hold that, where a binding election is made, "complete and unqualified transfer is intended."

In the states whose compensation acts most closely resemble the Federal Act, it has uniformly been held that the election transfers the cause of action, and deprives the claimant of further control over it. (*Whalen* v. *Athod Mfg. Co.*, 242 Mass. 547; *Skakandy* v. *State of New York*, 274 App. Div. 153.)

That is not to say that the injured workman is deprived of all interest in the outcome. If the employer or the insurance carrier chooses to enforce the right, the injured workman has an interest in the recovery. And to that extent the employer or carrier becomes a trustee of the fund recovered, having the obligation to pay over to the injured employee anything over the amount necessary to recoup its payments. Obviously that is all that was intended in the dictum of Mr. Justice Learned Hand in his opinion in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. 2d 46, when he said:

"* * * the assignee holds it for the benefit of the employee so far as it is not necessary for his own re-

coupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest. Certainly, he may not in advance release the whole claim upon consideration that he shall be personally released from his liability for Workmen's Compensation.'"

Nothing in the dictum itself, or in the authorities cited to support it, sustain the interpretation sought to be given to it by the petitioner, that the employee retains control over the cause of action and a right to interfere in its prosecution. That the same insurance carrier insures the employer for compensation and the negligent third-party for liability, while it may raise a question, cannot have the effect of changing the law. If the law gives to the employer or insurance carrier complete control over the cause of action, and all the authorities hold that it does, then the motives for prosecuting or not prosecuting that cause of action would seem to be irrelevant. As a matter of policy, divided control of the cause of action would raise more problems than it would solve. That is apparent in the present case. The claimant received minor injuries, his total compensation payments amounting to $160.72. A year later he claimed further injuries which he alleged were the result of his accident. These later injuries were not discovered or treated by the physician under whose care the plaintiff came immediately after his accident, and who treated the plaintiff for several weeks until in his opinion the injuries were entirely cured. It would seem unreasonable if, under those circumstances, the insurance carrier was under an obligation, or under some legal compulsion, to commence an action in an effort to establish liability for the claimed injuries and causal connection between the injuries and the accident. It would certainly seem to be within the reasonable discretion of the insurance carrier to determine that as things stood the institution of litigation was not advisable.

It has frequently been pointed out by the courts that the Workmen's Compensation Act is not perfect, and does not work perfectly under all circumstances. Dissatisfaction has been expressed before now with the assignment feature of the act, and for the same reasons as are here advanced by the petitioner. Despite many amendments to the act, the assignment provision has been retained in substantially its original form. The Congress, with knowledge of the established interpretation given to the provision by the courts, has seen fit not to amend it. There is no warrant in the history of the legislation, nor in the language or intent of the provision, which would justify importing into it the trustee relationship which the petitioner urges. Such a change in the law, if advisable, is a proper subject for Congressional action.

POINT II

The petitioner was guilty of laches.

The petitioner was injured on September 6, 1945, and this action was filed on June 12, 1952. Had he sued at common law, his action would obviously have been barred by the statute of limitations, whether the short statute in the case of negligence or the six year statute in the case of breach of warranty is applied. While the issue of laches is not to "be determined merely by a reference to and a mechanical application of the statute of limitations" (*Gardner* v. *Panama Railroad*, 342 U. S. 29), in the absence of an explanation for the delay, a court of equity will use the statutory limitation as a guide in determining whether to entertain the action or not (*Sullivan* v. *Portland and K. R. Co.*, 94 U. S. 806).

In this case no excuse was shown for the delay in bringing action. Actions had in fact been commenced in 1946 and 1947, which had not been pursued. No explanation was offered. Under those circumstances the Court of

Appeals was justified in finding that the petitioner was guilty of laches (*The Harrisburg* v. *Rickards*, 119 U. S. 199). In the *Harrisburg* case, *supra*, the opinion states:

> "No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and the suit was not brought until February, 1882, while the law required it to be brought within a year."

POINT III

The award was properly made.

At the hearing before Judge Ryan, plaintiff's counsel was asked by the court:

> "Do you admit, that thereafter and on September 28, 1945, the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the compensation act. Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel." (Appendix to libelant's brief, p. 17a.)

The petitioner now attacks the award, claiming that it is an "intermediate order", apparently on the ground that the employer was not given notice a claim was filed. It is submitted that the argument has no validity.

Section 921 of the compensation act provides that a compensation order "shall become effective when filed in the office of the deputy commissioner as provided in section

919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter." If the employer or the carrier had any objection to make on the ground of notice—which they did not—they had thirty days within which to make that objection; otherwise they waived it (*Parker* v. *Motor Boat Sales*, 314 U. S. 244).

The carrier knew that an accident had occurred and had so notified the compensation commission. Learning later that the injured employee was undecided as to whether he should take compensation or sue a third-party, the carrier notified the Deputy Commissioner, adopting a procedure suggested by the Supreme Court in *American Stevedores* v. *Porello*, 330 U. S. 446, 455. The libelant was then called in by the Compensation Commission, advised fully as to his rights of election, and he elected to file a claim for compensation rather than sue the third-party. Under those circumstances, since no hearing was ordered or requested or necessary, an award was made and filed. It is difficult to understand why the libelant calls this award "an intermediate order". There is no provision in the act which requires that an award make a final disposition of the compensation claim; the great majority of awards made by the Commission are not final. They are subject to change, modification or termination as the circumstances warrant. The requirement as to the ten-day notice was waived by the employer and his carrier, and cannot therefore affect the validity of this award (*Harris* v. *Hoage*, 66 F. 2d 801, 804; *Globe Stevedoring Co., Inc.* v. *Peters*, 57 F. 2d 256).

The Commission here had jurisdiction of the parties and of the subject matter. The award was made and filed by the commissioner after the notice required was given or waived. Even less formal procedures in the making of awards have had the sanction of the Courts. It was said in *Grass* v. *Lorentzen*, 149 F. 2d 127, 128:

"As a result of the amendment there must now be official action by the deputy commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against the third-party. Although the award may be informal, see *Toomey* v. *Waterman Steamship Corp.*, 2 Cir., 123 F. 2d 718, it must amount to an award by the deputy commissioner."

The award in this case was made in compliance with the statutory procedural requirements. Neither party appealed from it, and it became final after the expiration of thirty days from the date of its filing. Quite obviously it cannot now be subjected to collateral attack by the petitioner.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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PATRICK E. GIBBONS,
On the Brief.

IN THE

Supreme Court of the United States

October Term 1955.

No. 342

BLAZEY CZAPLICKI, *Petitioner,*

against

The S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING & TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC., *Respondents.*

BRIEF ON THE MERITS OF RESPONDENTS', S/S HOEGH SILVERCLOUD, OIVIND LORENTZEN, ETC., AND KERR STEAMSHIP COMPANY, INC.

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Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and Kerr Steamship Company, Inc.

FRANCIS X. BYRN,
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BRIEF ON THE MERITS OF RESPONDENTS', S/S HOEGH SILVERCLOUD, OIVIND LORENTZEN, ETC., AND KERR STEAMSHIP COMPANY, INC.

Jurisdiction

Respondents herein question the jurisdiction of this Court on the following grounds:

1. In so far as the petitioner purports to attack a compensation award made September 28, 1945, by Louis G.

Schwartz, Deputy Commissioner of the Second Compensation District of the United States Employees' Compensation Commission (Lib. Ex. 2; R. 5, 23, 67), this Court has no power of review because of the specific and exclusive provisions for review found in Title 33, U. S. C., Sec. 921, subdivisions (a), (b) and (d).

2. If the petitioner does not purport to attack the award of September 28, 1945, then petitioner has no standing in this Court because, under Title 33, U. S. C., Sec. 933(b), any cause of action petitioner might have had for personal injuries against respondents was assigned to his employer as of September 28, 1945, and, consequently, petitioner is legally disabled from bringing this present action and there is no controversy between the parties before the Court.

3. Petitioner seeks relief against his employer, Northern Dock Company, and/or his employer's underwriter, The Travelers Insurance Company, to impose a trust upon them or to compel them to reassign the cause of action to him.

There is no jurisdiction of the person of either the Northern Dock Company or The Travelers Insurance Company, as they are not parties to the suit.

Statutes Involved

In addition to the statutes cited by petitioner, respondents herein cite the following:

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, Chapter 509, 44 Statutes at Large 1424.

Section 21 (a), (b) and (d) (33 U. S. Code 921).

a. "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this chapter, and, unless proceedings for the suspension or setting aside of such

order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

b. "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

c. "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18 of this chapter."

Section 22 (33 U. S. Code 922).

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with

the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

Section 33 (a), (d), (h) and (i) (33 U. S. Code 933).

a. "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

d. "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding."

h. "The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election."

i. "Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

Questions Presented

Jurisdictional Questions

1. (a) Whether this Court has jurisdiction to review a compensation order or award where the exclusive statutory provisions for review as to time, venue and party to be sued have not been followed?

(b) Whether this Court has any jurisdiction to make any determination with respect to issues which are moot as between the parties to this action inasmuch as the cause of action, by reason of the compensation order, does not belong to petitioner but has been assigned to his employer?

(c) Whether this Court has jurisdiction to afford petitioner relief as against persons not parties to this action?

2. Assuming but not conceding that the validity of the award may be reviewed at this time, whether or not on the merits of the proceedings before the Deputy Commissioner a valid award was not made?

3. Whether or not petitioner made a binding election to accept compensation, thereby precluding any right to a third-party suit either directly under the award or indirectly by compelling the assignee to sue?

4. Whether in the absence of fraud or any conduct on the part of the Deputy Commissioner, the employer or the underwriter, not in keeping with the provisions of the Act or the decided cases, a trust relationship may be imposed by the Court where the statute does not provide for any such relief, and whether, even assuming such a trust relationship, this Court may give any such relief absent a showing of wrongdoing by the trustee?

5. Whether petitioner is barred by laches or whether the issue of laches is not moot as to the timeliness of this action for personal injuries because of the legal effect of the award in assigning the cause of action?

Statement

The petitioner, a longshoreman, filed a libel in admiralty on June 12, 1952, to recover damages for personal injuries allegedly sustained on September 6, 1945, while working aboard the s/s Hoegh Silvercloud, at Pier 3, Hoboken, New Jersey. His employer was Northern Dock Company. It is claimed that the petitioner fell down a catwalk on the deck of the s/s Hoegh Silvercloud, which was erected by respondent Hamilton Marine Contracting Company, Inc. At the time of the accident the vessel was owned by Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission. The above was an official organ of the Royal Norwegian Government.

Kerr Steamship Company, Inc., acted as agents for the vessel at that time.

Hamilton Marine Contracting Company, Inc., was engaged to do carpenter work aboard the vessel.

Following the accident, petitioner's employer, Northern Dock Company, filed a report of accident at the Compensation Commission, dated September 6, 1945 (Lib. Ex. 3; R. 5, 70A).

On September 17, 1945, it would appear (petitioner's brief p. 10) that petitioner went from his home in Jersey City, New Jersey, to the insurance company office in Newark, New Jersey, and was undecided as to whether or not to take compensation or to sue a third party.

On that same day The Travelers Insurance Company, the compensation carrier for petitioner's employer, sent a notice to the Commission, dated September 17, 1945, that the claim of the petitioner would be controverted (Lib. Ex. 4; R. 5, 71).

On September 25, 1945, Claims Examiner O'Keefe, for the Compensation Commission, addressed a letter to petitioner advising him that payments were being held up pending an election to take compensation or commence a third-party suit (Opinion Judge Sugarman, R. 33). (Note: This letter was designated by respondents herein to appear as part of the record, but unfortunately was not included. It appears instead at page 1a of an appendix to this brief.)

According to respondent Hamilton's Exhibit A (R. 4, 74), which was a memorandum prepared by Mr. D. B. O'Keefe, petitioner called at the Commission in New York on September 27, 1945, and the provisions of Section 33(b) of the Longshoremen's Act were explained to him. According to the memorandum, petitioner stated definitely that he desired to receive his compensation and to waive any rights to the third-party action, and that he did not desire to consult an attorney in the matter. The memorandum further said that the petitioner filed a claim for compensation and a formal order would be issued accordingly.

Libelant's Exhibit 1, dated September 27, 1945 (R. 3, 66A), shows that a claim for compensation was indeed filed by the petitioner.

Libelant's Exhibit 2 (R. 5, 67) is the compensation award issued on September 28, 1945, by Deputy Commissioner Louis G. Schwartz. Said exhibit also shows that the award was sent by registered mail to all parties on September 28, 1945. The award provided that the petitioner receive compensation for two weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, and thereafter until disability ceased.

Under the award, petitioner received compensation for seven weeks and one day, or a total of $160.72. On December 5, 1945, Claims Examiner O'Keefe again wrote petitioner advising him that compensation would cease because

petitioner had no further disability from work (Lib. Ex. 6; R. 6, 73).

No effort was made under Section 921 of Title 33, U. S. C. to obtain a review of the compensation order containing the award, and no effort was made by petitioner, based on any change of condition or mistake, to obtain a modification of the award within one year from the date of the last payment of compensation, as provided in Section 922 of Title 33.

Suit was commenced by the filing of the libel against the named respondents herein on June 12, 1952. Service was effected against Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, by service of process on Mr. Tancred Ibsen, Vice Consul of the Royal Norwegian Consulate in New York.

On July 29, 1952, exceptions and exceptive allegations were filed on behalf of Kerr Steamship Company, Inc., on the grounds of (1) petitioner's laches, and (2) because he had received a formal compensation award and was an improper party to bring suit, the case having been assigned to his employer by Section 933(b) of Title 33, U. S. C. (R. 20, 21). It was also urged before the Court that the formal compensation award of September 28, 1945, was final in so far as judicial review was possible, since more than thirty days had elapsed since its filing, citing 33 U. S. C. Sec. 921 (a), (b) and (d). After hearing argument on the exceptions, Judge Sugarman handed down a memorandum opinion (R. 33) sustaining the exceptions, based on the formal award.

By notice of motion (R. 38) dated October 30, 1953, petitioner for the first time sought relief against The Travelers Insurance Company either to add it as a party or to compel said company to assign the cause of action back to petitioner. In the opinion filed by Judge Henry

Goddard November 30, 1953, the motion was denied in all respects (R. 42).

Subsequently, it was agreed that all parties would appear before the Court for hearing as to whether or not the case should be dismissed as to The Norwegian Shipping & Trade Mission and Hamilton Marine Contracting Company, Inc., on the same grounds that it was dismissed as to Kerr Steamship Company, Inc., by Judge Sugarman, to wit, that there had been an award and an assignment of the petitioner's claim to his employer. After a hearing, Judge Sylvester J. Ryan followed the decision of Judge Sugarman of December 11, 1952, and dismissed the libel as to the two remaining parties May 10, 1954 (R. 11, 52).

There is no claim that either The Norwegian Shipping & Trade Mission or Kerr Steamship Company, Inc., were in any way associated with the Northern Dock Company, The Travelers Insurance Company or Hamilton Marine Contracting Company, Inc.

Summary of Argument

Respondents herein believe that a more orderly presentation of the argument would discuss first the assailability of the award; second, the validity of the award, and third the legal effect thereof, before any consideration can be given to a trustee relationship between petitioner and the Travelers Insurance Company and also the question of laches. These questions are jurisdictional and if there is no jurisdiction the rest of the argument is moot.

An award may be reviewed only under the specific and exclusive provisions of Section 921 (a), (b) and (d) of Title 33, U. S. C. Petitioner has attacked the award both directly in his brief and collaterally by the very bringing of this suit.

If petitioner is legally disabled from attacking the award, is not attacking the award, or the award is valid on its own merits operating to assign the cause of action to petitioner's employer, then there is no cause of action by petitioner Blazey Czaplicki against any of the respondents herein and therefore no controversy between any of the parties into this suit. Any further relief that petitioner seeks must come in another proceeding.

Petitioner has made a binding election to accept compensation in this suit in accordance with the provisions of Title 33, U. S. C., 933(a). The election was made under a formal award (Title 33, U. S. C. 933(b)) and petitioner has waived any right to a third party action either in his own right or in the name of a trustee.

It is only when we assume that the award is a valid one that petitioner's point as to the Travelers Insurance Company and/or Northern Dock Company being trustees comes into play. If the award be invalid, then there was no assignment and the petitioner himself could bring suit subject only to the question of laches. It can be seen readily, therefore, that the petitioner himself must assume in his first point in his brief that the award is a valid one operating as an assignment.

The Longshoremen's Act does not compel an assignee under an award to sue a possible third party. The assignee may sue or compromise or not claim at all. Everything that took place before the Deputy Commissioner in this suit was within the provisions of the Act. Petitioner's criticism is of the Act itself. A bill (H. R. 10119—March 21, 1956) has been introduced seeking to change the effect of an award. Fraud has been specifically disavowed by petitioner. Under the authority of *Hunt* v. *Bank Line, Ltd.*, 35

F. 2d 136, the assignee has complete control of the disposition of the case following assignment. Even assuming that the employer and carrier be deemed trustees in a situation where a potential third party is covered by the same underwriter as a claimant's employer, it is not enough to deem this a trustee relationship, but there must be shown some breach thereof on the part of the trustee. Identity of underwriters does not of itself show any breach of the relationship so as to compel the trustee to sue the named third parties herein in behalf of petitioner. The trustee might have acted in good faith and in petitioner's best interests in not commencing suit. In any event, this Court does not have the power to either impose a trust on the Northern Dock Company or the Travelers Insurance Company or to hold that these parties have been guilty of a breach of trust inasmuch as they are not parties to this lawsuit. Any such relationship must be established under a separate proceeding brought for that purpose.

Given an award with a consequent assignment of the cause of action to petitioner's employer, petitioner could not, of course, be guilty of laches in commencing this suit, for it was not his to begin with. Petitioner was guilty of laches in not moving under Section 921 of Title 33, U. S. C., to set aside the award, or moving under Section 922 of Title 33, U. S. C., to modify the award if dissatisfied with the payments of compensation.

The Royal Norwegian Government having continuously maintained the consulate on which service was effected, no statutes of limitation have been tolled.

ARGUMENT

POINT I

Petitioner did not comply with the specific and exclusive provisions for review in Section 921 of Title 33, U. S. C., and therefore this Court has no jurisdiction to review the compensation award of September 28, 1945.

On page 35 of his brief on the merits petitioner states that he does not attack the proceedings in the Commission directly or collaterally. He does, at the same time, deny the legal effect of the compensation award of September 28, 1945, assigning the cause of action to his employer. Petitioner claims that it did not meet the procedural requirements of Section 919. This is, of course, a direct attack on the award. Petitioner collaterally attacks the award by the very bringing of this action for personal injuries, which must assume (1) there is no assignment and therefore (2) the invalidity of the award of September 28, 1945.

Section 921 (a) and (b) of Title 33 are specific as to the procedure to be followed for review of a compensation order. Suit is to be commenced in the District Court in the district where the accident occurred (New Jersey, not New York), within thirty days after the filing of the compensation order, and shall be brought against the Deputy Commissioner. None of these requisites have been followed.

Section 921(d) expressly provides that this is the exclusive method of review.

In *Crowell* v. *Benson*, 285 U. S. 22 (1932), this Court said, p. 63:

> "* * * The remedy which the statute makes available is not by an appeal or by a writ of certiorari for

> a review of his determination upon the record before him (the deputy commissioner). The remedy is 'through injunction proceedings, mandatory or otherwise.' § 21(b)."

The statute has been strictly construed.

In *Parker* v. *Motorboat Sales, Inc.*, 314 U. S. 244 (1941), at pp. 250-251, this Court held that in the instance of an improper party claimant the award of the Deputy Commissioner would be immune from an attack where the period for review had elapsed. In that case the facts showed that the deceased employee did not have a legal representative, the claim being filed by his widow. The statute provided that the legal representative was to bring suit or file claim. This Court said, p. 251, as to the contention of the respondent that the award was void:

> "Since the respondent did not contest the widow's capacity to file a claim, either before the Deputy Commissioner or in the District Court, the objection, even if otherwise meritorious, was made too late. Cf. *McCandless* v. *Furland*, 293 U. S. 67."

The United States Courts of Appeals and their predecessor courts have also construed Section 921 strictly.

In *Associated Indemnity Corporation* v. *Marshall*, 71 F. 2d 235 (1934), the Ninth Circuit, discussing Section 921(b) as a form of appeal, said at p. 236:

> "* * * Although in form not an appeal, a proceeding to set aside the award is somewhat analogous to an appeal; * * *. * * * Appellants argue, however, that since these proceedings are in equity, and are not attacks on decrees or judgments of a court, the chancellor exercising the flexible powers of equity should do full and not partial justice. But the remedial powers of the court are only those which are conferred by the statute and are strictly confined to the suspension or setting aside of the order."

In *Swofford* v. *International Mercantile Marine Company*, 113 F. 2d 179 (1940), the Court of Appeals for the District of Columbia found that the 30-day period had expired before application for review was made and that (p. 182):

> "It is well settled that when the time for appeal has expired, a judgment entered by a tribunal with jurisdiction is binding even though erroneous."

The Court then cited Section 921(d), and commented on it by saying (pp. 182-183):

> "By this provision we think Congress has clearly precluded collateral attack on an order of the Deputy Commissioner, at least where the latter had jurisdiction over the claim for compensation, over the parties, and where the review provided by § 21(b) would have embraced the issues involved. Having failed to avail itself of its statutory remedy the company is without any."

The company then claimed the constitutional right to "attack collaterally" an order of the Deputy Commissioner. The Court said of the right to a hearing and the right to review (p. 183):

> "* * * Where, as here, those safeguards are made available to the employer, the contention that there is a constitutional right to attack the Deputy Commissioner's order collaterally is without foundation. Due process of law is not so arbitrary."

A failure to proceed according to the statute in any particular is a jurisdictional defect in any other proceeding attacking the award directly or collaterally. Thus, in *Hagens* v. *United Fruit Co.*, 135 F. 2d 842 (C. C. A. 2, 1943), the plaintiff, as here, assuming the invalidity of the award, commenced an action for personal injuries. The defendant's motion to dismiss was upheld on the grounds that the award was being collaterally attacked and that plaintiff should have proceeded against the Deputy Commissioner.

In *Bassett* v. *Massman Construction Co.*, 120 F. 2d 230 (1941) (8th Cir.), Cert. Den. 314 U. S. 648, it was held that the action against the Deputy Commissioner could only be brought in the District where the award was made, and other District Courts had no jurisdiction.

Failure to proceed within the 30-day time limit is also a fatal jurisdictional defect.

In *Mille* v. *McManigal*, 69 F. 2d 644; 645 (1934) (2d Cir.), the claimant sought a petition for mandamus to compel the Deputy Commissioner to hear an application to increase an award. At the time of the award, the petitioner's injuries were thought to be slight, but later they turned out to be more serious than anticipated. After the lapse of more than two years from the granting of the award, the plaintiff made an application under Section 922 to have the award increased, which the Deputy Commissioner denied. The District Court dismissed the petition and, on appeal, the Second Circuit, after stating it had no jurisdiction of a petition for mandamus, went on to say, page 645:

> "* * * If it be treated as a bill in equity for a 'mandatory' injunction under section 921 of title 33 USCA, then it was not filed in season. Section 921(a) provides that a 'compensation order' becomes 'final' at the end of thirty days after it is filed unless proceedings under section 921(b) have been begun meanwhile. We said in Twine v. Locke (Jan. 8, 1934), 68 F. (2d) 712, that this involved as a corollary that any suit under section 921(b) must be begun within thirty days after the compensation order was filed, from which it was indeed no more than a kind of appeal. Here the deputy commissioner's order was filed on May 5, 1933, and the rule nisi for the writ was taken out on June 26, 1933, more than thirty days thereafter. If this be a bill in equity under section 921(b), it was therefore too late. The District Court had no jurisdiction and should have dismissed the petition for that reason."

The Court of Appeals for the Second Circuit in its opinion in the case at bar (R. 56, 59) said:

> "Libelant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceeding. But the statute allows direct judicial review of an award, 33 U. S. C. Sec. 921, and that section provides the exclusive method of securing judicial relief."

POINT II

Assuming but not conceding that petitioner may challenge the award of September 28, 1945, it is clear that the proceedings before and the award of the Deputy Commissioner were in all respects in accordance with the provisions of the Act.

In his brief on the merits, petitioner in Point III voices three criticisms of the procedure before the Deputy Commissioner as grounds for denying legal effect to the award. It is claimed that there was no hearing; that no 20-day period had elapsed from the date notice had been given to the employer of a claim being filed before an award was made; and the point is also raised that the award does not have an element of "finality". In substance, therefore, it is petitioner's contention that, because of a failure to satisfy procedural requirements, the order entered by the Deputy Commissioner did not operate as an assignment of the cause of action to his employer under Section 933(b) of Title 33, although admitting that he is not attacking the proceedings of the Compensation Commission, directly or collaterally (p. 35, petitioner's brief). These positions are, of course, inconsistent, but it may, nevertheless, be profitable to examine the proceedings before the Deputy Commissioner to test petitioner's claim of impropriety.

The procedural requirements for an award are set forth in Section 919 of Title 33 USC. A perusal of the exhibits herein shows that said requirements have been fully complied with:

1. Claim was filed as required under Section 919(a) (Libelant's Exhibit 1, R. 66A).

2. It was not necessary to notify claimant that a claim had been filed (Sec. 919(b)); and as to the employer and carrier, sufficient notice may be presumed (Sec. 920(b)). Indeed, the employer knew of the injury because it reported it to the Compensation Commission (Libelant's Exhibit 3, R. 70A). The carrier received notice of the injury from the employer on September 11, 1945, as appears from Libelant's Exhibit 4, item 7 (R. 71). The carrier was aware of the claim filed with the Compensation Commission, because it controverted the same (Libelant's Exhibit 4, R. 71).

3. The Deputy Commissioner made an express finding of fact that he investigated the case, as required under Section 919(c) (Libelant's Exhibit 2, R. 67).

4. The Deputy Commissioner stated in the award that no interested party applied for a hearing; it was therefore waived by all. The Deputy Commissioner also stated that no hearing was necessary. Under Section 919(c), the Deputy Commissioner shall make such investigation as he considers necessary and, upon application of any interested party, shall order a hearing. Since no application was made, no hearing was necessary.

5. Under Section 919(e), the order rejecting the claim or making the award is to be filed in the office of the Deputy Commissioner, and a copy sent by registered mail to the claimant and to the employer. Under Libelant's Exhibit 2, R. 67; at 69, D. B. O'Keefe, the Claims Examiner, certifies that he mailed a copy of the award to the claimant.

the employer and the underwriter. Claims Examiner O'Keefe certified that a "Compensation Order" was sent by registered mail. The document known as Libelant's Exhibit 2, R. 67, has for its description the very words employed in Section 919(e), that is,

"Compensation Order
Award of Compensation."

Concededly, under Section 919(c), the Deputy Commissioner did not wait 20 days after notice of claim was given to make the formal award. However, neither the employer nor the carrier has ever contested this irregularity. After claim is filed a hearing is primarily for their benefit to contest the claim that has been made. Here, the libelant obtained the more favorable of two possible results: his claim was not rejected; he did receive an award. A similar irregularity with respect to the 20-day period referred to in Section 919(c) has been held to be unimportant under a limitation that is "directory not mandatory or jurisdictional". *Maryland Casualty Co.* v. *Cardillo*, 99 F. (2d), 432 (Court of Appeals, Dist. of Columbia, 1938).

In *Candado Stevedoring Corp.* v. *Willard*, 185 F. 2d 232, 1950, the Court of Appeals for the Second Circuit said:

"* * * The 20-day provision in the last sentence of Sec. 19(c) we regard as neither mandatory nor jurisdictional."

The Court of Appeals in the case at bar (R. 56, 59) in its unanimous opinion said:

"* * * Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on the claim or make an award without a hearing after 20 days had expired from service on the employer of notice of the claim (33 USC 919). In the instant case, there was no hearing nor was a hearing requested.

> Admittedly, the Deputy Commissioner did not wait until 20 days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim."

The reason for the speedy action on the part of the Deputy Commissioner is obvious. The carrier filed a notice with the Deputy Commissioner that the claim would be controverted. This meant that the compensation need not be paid by the carrier (Sec. 914(a)). The Deputy Commissioner acted expeditiously in petitioner's interest to afford him the compensation he requested.

In *Norton* v. *Warner Co.*, 321 U.S. 565, 568, 569, this Court discussed the legislative policy behind prompt processing of claims to awards.

> "The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it. By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged."

Petitioner objects to the award as lacking "finality". This argument overlooks the fact that the findings of fact by the Deputy Commissioner contained in the award (R. 67) disposed of all issues in the case, except for the duration of a compensation. This, of course, could only be based on the length of petitioner's disability. Under petitioner's reasoning, the Deputy Commissioner, lacking clairvoyance, could never make an award until such time as disability ceased. That being so, the carrier could withhold compensation from the time it controverted the claim until an award was made (33 U.S.C. 914a). There is no authority in the Longshoremen's Act or in any practical administration thereof for any such practice. There is nothing more for the Deputy Commissioner to do, once he has es-

tablished the jurisdiction of the parties, the subject matter, the rate of compensation due the claimant, who shall pay the compensation and at what intervals. The rest is up to the doctors who periodically evaluate claimant's condition.

A distinction is attempted to be drawn in petitioner's brief between an award and an order, to wit, that this is not an award but merely an order. Actually, the language of Section 933(b) is the language of "compensation order", that is an award in a "compensation order". Section 919(e) refers to "the order rejecting the claim or making the award". Consequently, the distinction between an award and an order avails petitioner nothing because the Act refers to the document as a "compensation order".

Under Section 919(c), the Deputy Commissioner may do only two things when a claim has been filed. He may reject the claim or make an award in respect of the claim. Obviously, the Deputy Commissioner intended to make an award, and to all appearances did make an award. Petitioner's contention that it should be given less than its legal effect is unsupportable.

Petitioner cites *American Mutual Liability Ins.* v. *Lowe*, 13 F. Supp. 906, in support of his contention that there was no award. To understand clearly the holding in that case, it is necessary to read the opinion of the Court of Appeals for the Third Circuit, 85 F. 2d 625. Such opinion discloses that the Deputy Commissioner himself did not intend an award; that the so-called award was not signed; not served by registered mail; and was held in effect to be a "memorandum for file", which contained suggestions as to the disposition of the claim. The Court said at page 627:

> "The Deputy Commissioner used in his memorandum words of suggestion rather than of order."

Since there was no order or award, no 30-day period ran under Section 21, within which to attack it, and the Court of Appeals held that the lower Court had jurisdiction over

the case. None of the defects exist in the case at bar and the two cases are patently distinguishable.

It is readily apparent that the activities of the Deputy Commissioner in making this award in compensation order comported in all respects with procedural due process; that even if the petitioner may attack the award in the way he has, his criticisms are without merit. The petitioner was apparently disappointed in not receiving more compensation than he did, but, if he wished to attack the award, the remedy was open to him under Section 921(b); and if he wished the award modified because of a change in condition, it could have been done pursuant to Section 922 within one year after the date of the last payment of compensation. He did not undertake to follow either procedure.

POINT III

Given a valid award, petitioner's cause of action was assigned to his employer, and therefore there is no controversy between the parties to this action.

Should this Court hold, as did both the District Court, in the opinion of Judge Sugarman, and the Court of Appeals, in the opinion of Judge Frank, that there was an award and a consequent assignment of the cause of action to petitioner's employer, then there can be no cause of action by Blazey Czaplicki for personal injuries against all the respondents herein.

Since September 28, 1945, therefore, the within action for personal injuries has belonged to either Northern Dock Company or the Travelers Insurance Company by subrogation under Title 33 U. S. C. 933(I). When petitioner sued the vessel and the three respondents herein on June 12, 1952, he was legally disabled from doing so and, despite

all the activity in the case since that date, he is still so disabled.

Petitioner has usurped this assigned cause of action and employed it as a vehicle in the District Court, the Court of Appeals and in this Court to press his point that because of the identity of underwriters a trust relation exists between the Travelers Insurance Company and himself. Whatever merit there may be in such a contention should be asserted in another proceeding.

POINT IV

Petitioner has made a binding election to accept compensation and has thereby waived his right to sue a third party.

On September 17, 1945, petitioner was, according to his brief (page 10) at the office of the Travelers Insurance Company. At that time he was undecided whether or not to sue a third party.

On the same date the Travelers Insurance Company prepared a notice to the Deputy Commissioner that the claim would be controverted (Libelant's Exhibit 4, R. 71). Thereafter Claims Examiner O'Keefe of the Compensation Commission wrote a letter to petitioner explaining the alternatives open to him (Appendix to this brief, page 1a).

On September 27, 1945, petitioner appeared at the Compensation Office in response to the letter and discussed the election with Claims Examiner O'Keefe (Respondent Hamilton's Exhibit A, R. 74). According to Claims Examiner O'Keefe's memorandum:

> "He stated very definitely that he desired to receive his compensation, and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

> He filed a claim for compensation and a formal order will be issued accordingly."

Bearing out Claims Examiner O'Keefe's statement that a claim was filed, we have such a claim under date of September 27, 1945, signed by claimant and appearing as Libelant's Exhibit 1, R. 66A. The following day the formal compensation award was issued by Deputy Commissioner Louis G. Schwartz (Libelant's Exhibit 2, R. 67).

Thus, if everything Claims Examiner O'Keefe has said were true, then petitioner in 1945 elected to accept compensation in lieu of commencing a third-party suit as provided in Section 933, subdivision (a) of Title 33. His election was formalized in the award as provided in Section 933, subdivision (b) of Title 33.

Petitioner has denied that his rights were explained to him and that he did not understand what Claims Examiner O'Keefe said to him (R. 25).

With respect to this conflict District Judge Sugarman, in his opinion (R. 33) dismissing the libel as against Kerr Steamship Co., Inc., said (R. 35):

> "Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keefe's categorical statement of what transpired on September 27, 1945, docketed in the Commission's file the next day, I cannot accept the libelant's statement (in his answering affidavit of October 28, 1952) more than seven years later that he did not understand what O'Keefe told him as a basis for upsetting the finality of the Deputy Commissioner's award."

Under Section 933(a) of Title 33, U. S. C., a claimant may "elect by giving notice to the Deputy Commissioner in such manner as the Secretary may provide, to receive

such compensation or to recover damages against such third person."

In *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 454, petitioner argued that although (since the amendment to Section 33(b) of the Longshoremen's Act of 1938) mere acceptance of compensation did not operate as an assignment to the employer of the injured employee's cause of action against the third party tort feasor, said acceptance still operated as a conclusive election not to sue. This Court disagreed and said (p. 455):

> "* * * It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by Section 33(a) of the Act, which provides for notice of intention to the Deputy Commissioner, so the argument is technically imperfect. But, in any event, election not to sue a third party in assignment of a cause of action are two sides of the same coin."

Implicit in this decision is the holding that for an election to be effective it can only be accomplished in an award, assigning the cause of action as occurred in the present case.

A decision to accept compensation is not necessarily a bad one. Indeed so far is the Deputy Commissioner invested with discretion and authority that if petitioner were a minor, the Deputy Commissioner might make the election for him.

Petitioner, having consciously elected to accept compensation and waive a third party suit according to the exhibits and Claims Examiner O'Keefe, and there being no claim of fraud or duress, petitioner should not be heard to criticize his employer, Northern Dock Company, and/or the employer's underwriter, the Travelers Insurance Company, for not suing on the assigned cause of action.

POINT V

The Longshoremen's Act specifies no trust relationship between a claimant and the assignee under an award with respect to the decision to sue a third party.

If such a relationship does exist, there is no proof that there was any breach thereof in this case and any such breach must be determined in a separate proceeding against the party alleged to be trustee.

Petitioner apparently does not urge that a trust relationship between assignee under an award and a compensation claimant springs up in every case. It is petitioner's point that because the underwriter for Northern Dock Company, the Travelers Insurance Company, was the same as for the third party, Hamilton Marine Contracting Co., Inc., such special circumstances give rise to the trust relationship. Section 933 of Title 33 provides in section (d):

> "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding."

There is no language in the section compelling the institution of such a third party proceeding. However if the assignee compromises the claim or recovers in a suit brought against a third party, the assignee becomes a trustee to the extent of the amount of the recovery over the amount it is entitled to retain (33 U. S. C. 933(e)).

Petitioner asks this Court to recognize a trust relationship because of the alleged interest of the Travelers Insurance Company in not having Hamilton Marine Contracting Co. sued. Petitioner's point is not that there has been any wrongdoing in this case or any fraud practiced on petitioner, but that the situation lends itself to petitioner being put to a decision between compensation and suit when his judgment may be bent toward expediency. This criticism,

if valid, is not of any procedure in this case, but of the Act itself.

Petitioner is here trying to amend the Act by judicial, not legislative process. In fact there is a bill already introduced, H. R. 10,119, introduced March 21, 1956, that would permit third party actions to be brought despite the issuance of a formal award, and also would prohibit an employer from controverting liability on the grounds a third party is liable (Appendix to this brief, page 2a).

With respect to fraud District Judge Goddard, in his opinion rejecting the trust theory on the authority of *Hunt* v. *Bank Line*, 35 F. (2d) 136, said (R. 46):

> "Were there a showing of fraud, the result might be different. * * * the libelant does not charge fraud."

At the hearing before District Judge Ryan below, the following colloquy ensued (R. 6):

> "The Court: Has the libelant any proof of any fraud that it desires to submit to the Court?
>
> Mr. Terhune: I object to such proof——
>
> The Court: I just want to inquire and then I will hear your objection if an offer is made.
>
> Mr. Baker: We have no such evidence at this time, your Honor."

Apart from fraud, there was no conduct on the part of the employer, the insurance carrier or the Deputy Commissioner which was not sanctioned by the act or by the opinion of this Court in *American Stevedores* v. *Porello*, 330 U. S. 446, as to the "forcing" of the award. If Northern Dock Company and/or the Travelers Insurance Company have taken advantage of the provisions of the Act, they were doing no more than this Court suggested an employer might do to protect itself against being impleaded as a third party when it said in *American Stevedores* v. *Porella*, *supra*, in referring to American Stevedores, Inc., the impleaded third-party employer (p. 455):

> "* * * American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way it could probably have forced an award and a consequent assignment of the right of action to itself."

If there is no fraud, if the Act does not provide for a trust relationship as to control of the suit and if whatever Northern Dock Company and Travelers Insurance Company did was in accordance with the Act, then there appears no special reason why a trust should be imposed in this case because of the fact that the Travelers covered both the Northern Dock Company and Hamilton Marine Contracting Company, Inc.

Even if the employer and carrier be deemed trustees, not only the trustee relationship must exist, but some breach thereof on the part of the trustees must also be shown before this suit may be prosecuted further. Identity of underwriters does not establish the breach. For example, if this personal injury case brought by petitioner lacks merit as a lawsuit, then The Travelers Insurance Company was justified in its decision not to prosecute further. If the injuries were trivial, as indeed the impartial compensation doctors found them to be, then The Travelers Insurance Company, as an economy measure, was justified in dropping not only its own claim for the $160.62 compensation, plus medical expenses paid, but any further claim that petitioner might have had in the way of a recovery over that amount.

This Court has no power or time to inquire into these facts. They must be accomplished in a proceeding wherein The Travelers Insurance Company and the Northern Dock Company are parties, and may meet the allegations of breach of trust or bad faith. Even if there were a trust relationship, petitioner has mistaken his remedy since relief if any against Northern Dock Company and The Travelers Insurance Company should be made the subject of a new and separate proceeding against those parties before the action for personal injuries be brought.

POINT VI

The question of laches.

Since it is the position of the respondents herein that there was a proper award and the consequent assignment of the cause of action to the petitioner's employer, petitioner could not, of course, be guilty of laches or delay in commencing the present suit since it was not his to begin. Only if the award is invalid is the question of laches reached. The petitioner is, of course, guilty of laches in not moving under Section 921 of Title 33 U. S. C. to set aside the award, or under Section 922 of Title 33 U. S. C. to modify the award if dissatisfied with the payments of compensation. The petitioner may also have been guilty of laches in making his point that the Northern Dock Company and/or The Travelers Insurance Company were to act as trustees in his behalf. This was not made until October 30, 1953. That issue, however, should be resolved in a proceeding brought against those parties for the relief asserted, and not in this action for personal injuries.

While petitioner cites a host of statutes he nowhere claims the Royal Norwegian government did not continuously maintain the consulate on which service was effected from the accident until the suit was started.

If the award is invalid, the issue of laches is to be determined properly by the lower Court with respect to the time limitation applicable to an action for personal injuries. If the award be valid, the issue of laches is moot.

CONCLUSION

The award is not now subject to review. In any event it was validly made and operated as an assignment of the cause of action to petitioner's employer. As such, the petitioner has no standing in this court. The petitioner has made a binding election to accept compensation. The trustee argument has no foundation under the Act, as drawn or under the facts in this case. Further, it should be asserted in another proceeding against the persons sought to be named as trustees. Given a valid award, laches is not in issue, except as to the timeliness of petitioner's asserting the trust relationship.

The case should be dismissed for lack of jurisdiction and on petitioner's election to accept compensation.

Dated, April 10, 1956.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Respondents
s/s Hoegh Silvercloud,
Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and Kerr Steamship Company, Inc.

FRANCIS X. BYRN,
on the brief.

APPENDIX

(In Evidence Before Judge Sugarman)

65-438

Carrier's No. B-5981165

September 25, 1945.

Mr. Blazey Czaplicki,
259 4th Street
Jersey City, N. J.

Re: Blazey Czaplicki
Northern Dock Co.
Inj. 9/6/45

Dear Sir:

Your employer's insurance carrier has advised this office that compensation payments are being withheld in your pending election to take compensation or to sue a third party.

If you intend to accept compensation, you should file a claim on the enclosed form U. S. 203 and a formal order will be issued. Section 33(b) of the Act provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

If, on the other hand you elect to sue the third party, you should file an Election to Sue on the enclosed form U. S. 213 in order to protect your future interests in the event that you should be unable to recover from the third party the amount that you would be entitled to under the Compensation Act.

Very truly yours,

D. B. O'KEEFE,
Claims Examiner.

DBO/ERC
Enc.

Copy to carrier.

H. R. 10119

84TH CONGRESS
2nd Session

IN THE

HOUSE OF REPRESENTATIVES

March 21, 1956

Mr. Zelenko introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act to provide that employees may recover damages from third parties despite the acceptance of compensation under this Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 14 (d) of the Longshoremen's and Harbor Workers' Compensation Act is amended by adding at the end thereof the following new sentence: "No employer may controvert the right to compensation on the ground that the person entitled to such compensation might have a right to recover damages against any third party for the injury or death of the employee."

SEC. 2. Section 33 of the Longshoremen's and Harbor Workers' Compensation Act is amended to read as follows:

"COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

"SEC. 33. Nothing in this Act shall prevent any person entitled to compensation under this Act from proceeding

against third parties for recovery of damages arising out of an injury, notwithstanding acceptance of compensation on account of such injury under an award in a compensation order filed by the deputy commissioner or the acceptance of compensation voluntarily paid by an employer, by the person entitled to such compensation. Acceptance of compensation under this Act shall not constitute an assignment of any cause of action of the employee against the third party."

SEC. 3. The amendments made by this Act shall not apply in the case of injuries or deaths occurring prior to the date of enactment of this Act.

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 342

BLAZEY CZAPLICKI,

Petitioner,

v.

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OLVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING AND TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., ON THE MERITS

RAYMOND J. SCULLY,
Counsel for Respondent,
Hamilton Marine Contracting Co., Inc.

GALLI & LOCKER,
Of Counsel,

PATRICK E. GIBBONS,
On the Brief.

ACKERMAN PRESS, Phone: BO 9-7107-8

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Respondents.

BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., ON THE MERITS

The Questions Presented

1. Whether a valid award of compensation pursuant to the provisions of 33 U. S. C. § 933 was made to the petitioner?

2. Whether, after a statutory assignment of the injured employee's cause of action to his employer has been effected pursuant to the provisions of that statute, any right to control or direct prosecution of the assigned cause of action remains vested in the injured employee?

3. Was the Court of Appeals in error in deciding the case on the issue of laches?

Statutes Involved

The provisions of Title 33 U. S. C. § 933 are set forth in petitioner's brief, with the exception of subdivision (d) which reads as follows:

> "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

Title 33 U. S. C. § 921 provides in part:

> "(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). • • •
>
> (d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

Statement

The relevant facts have been set forth with substantial accuracy in the petitioner's brief. After the notice of controversy had been filed by the insurance carrier with the compensation commission, Mr. D. B. O'Keeffe, Claims' Examiner, called the petitioner in and explained to him the provisions of the Longshoremen's Act. The memorandum of this interview made by Mr. O'Keeffe is contained in Respondent Hamilton's Exhibit A, received in evidence at page 3 of the record and printed at page 74. The memorandum states:

> "The claimant called on September 27, 1945, and the provisions of section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.
> He filed a claim for compensation and a formal order will be issued accordingly."

At the hearing before Judge Ryan, counsel for the petitioner admitted that an award had been duly made. The following took place at that hearing:

> "The Court: Do you admit that thereafter and on September 28, 1945, the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the Compensation Act?
>
> Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel." (R. p. 3)

In the compensation award the deputy commissioner found as a fact that the claimant had "sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip". (Libelant's Exhibit 2, admitted at page 5 of the record, printed at pages 67 and 68.) The compensation awarded was at the rate of $22.50 a week for temporary total disability (R. p. 68), and the total amount paid was $160.72 (R. p. 6).

Summary of Argument

1. The award of compensation to the petitioner made by the deputy commissioner was made in substantial compliance with the provisions of the statute with reference to the making of awards, and was, therefore, valid.

2. The statutory assignment of petitioner's cause of action to his employer, effected by the acceptance of compensation payments pursuant to the award, was, in the absence of fraud, absolute. There is neither proof nor claim of fraud in this case. The assignment vested complete control over that cause of action in the employer and no trustee relationship could arise until a recovery was had in excess of the amount necessary to recoup payments made pursuant to the award. Even if it be held that the assignee is a constructive trustee of the cause of action, the assignee must still be accorded a reasonable discretion in determining whether to institute proceedings or not, apart entirely from the fact that it is given that discretion specifically by the terms of the statute. The fact that the same insurance carrier insures the employer for compensation and the third-party tortfeasor for liability does not materially affect the principle. In the absence of proof of fraud or bad faith, the injured employee would have no right to interfere with, or compel the prosecution of, the cause of action.

3. In the absence of any explanation by the petitioner for the delay in commencing the action, the Court of Appeals properly held that the defense of laches was a bar to any action by him.

POINT I

The award was properly made.

When the petitioner here was unable to make up his mind whether to take compensation or to prosecute an action against the third-party, the insurance carrier filed a notice that it was controverting the claim. In this it followed a procedure outlined in the opinion in *American Stevedores* v. *Porello*, 330 U. S. 446, where it was said:

> "American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way, it could probably have forced an award and the consequent assignment of the right of action to itself."

On receipt of the notice of controversy, the claims examiner wrote to the petitioner informing him that payments of compensation were being withheld pending his election to take compensation or to sue the third-party, and outlining his rights to him. Some days later the claims' examiner interviewed the petitioner at the Commission office and again explained his rights to him. The petitioner then elected to take compensation and filed a notice of claim. Under the circumstances no hearing was necessary and no hearing was held. The deputy commissioner entered an order awarding compensation to the petitioner. This order was filed in the Office of the Deputy Commissioner and became final after thirty days.

The petitioner objects to the procedure adopted by the deputy commissioner, apparently on the ground that the

notice to the employer that the claimant had filed a claim for compensation and the order of the deputy commissioner are both dated September 28, 1945. The basis for that contention is the wording of subdivision (c) of section 919 of the Act, which provides:

> "If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect to the claim."

The petitioner contends that, in a case where no hearing is ordered, the deputy commissioner must allow twenty days to elapse from the time he serves on the employer notice that a claim for compensation has been filed by the employee before making an award. It is respectfully submitted that the meaning of that provision is that the commissioner must make an award within the twenty days, not that he must wait twenty days before making his award. However, even if the interpretation sought to be put upon the provision by the petitioner is valid, the employer, by not objecting on the ground of insufficient notice, waived that objection (*Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Harris* v. *Hoage*, 66 F 2d 801, 804; *Globe Stevedoring Co., Inc.*, v. *Peters*, 57 F 2d 256).

The petitioner further objects that the order was not final. There is no requirement in the statute that an award be final. Of necessity awards in compensation matters are provisional, subject to change or modification with the change in physical condition of the injured workman. The provision of § 933 (b) of the statute is that "acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment"; there is no requirement that it be acceptance of compensation under a final award. The authority cited by petitioner in his brief, *American Mutual Liability Insurance Co.* v. *Lowe*, 13 F Supp. 906, affirmed 85 F 2d 625, holds nothing to the contrary. In

that case the award was not filed as required by the statute, nor was it served; obviously it was not a binding award. There were no such defects in the award made here.

It has already been pointed out that counsel for the petitioner, in the hearing before Judge Ryan, admitted that the award had been duly made and entered on an order directing payment of compensation to the petitioner. The Compensation Commission had jurisdiction of the parties and of the subject matter. The award was made and filed by the commissioner in substantial compliance with the requirements of the statute. No question was raised either by the employer or by the insurance carrier that the required notice had not been given. Even less formal procedures in the making of awards have had the sanction of the courts (*Grass* v. *Lorentzen*, 149 F 2d 127, 218). In the *Grass* case, *supra*, the court said:

> "As a result of the amendment there must now be official action by the deputy commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against the third party. Although the award may be informal, see *Toomey* v. *Waterman Steamship Corp.*, 2 Cir., 123 F 2d 718, it must amount to an award by the deputy commissioner."

What the petitioner is doing here is in effect making a collateral attack on the award. His time to attack the award has long since elapsed. He cannot now redeem his failure to move in time with respect to the award by claiming that it was not an award.

POINT II

The assignment resulting by operation of Title 33 U. S. C. A. section 933 (b) is, in the absence of fraud, absolute, vesting in the employer or the insurance carrier complete control of the cause of action against the negligent third-party until a recovery is had either by settlement or after a trial.

The design and the purpose of the Longshoremen's Act was to provide injured workmen with assured compensation for injuries received in the course of their employment. The provisions of the act with reference to actions against negligent third-parties responsible for the workman's injuries are incidental to the main scheme of the act. The injured workman's right to sue a negligent third-party was preserved, but not as an absolute right. He was given a choice. He could elect to sue the negligent third-party or to take compensation; he was not permitted to do both.

As the act was originally written, the workman's binding election was evidenced by the mere acceptance of compensation. Problems arising in the courts as to the justice of binding the injured workman to an election which he might have made in ignorance of his rights (Cf. *Johnsen v. American Hawaiian S.S. Co.*, 98 F 2d 847, 850) prompted the Congress to amend the act in 1938 to its present form in which acceptance of compensation under an award constitutes a binding election. This eliminated the possibility of the injured workman claiming that he had accepted compensation in ignorance of his rights. In the proceedings leading to the award the workman is apprised of his rights, and he is then free to choose whether to sue or to accept compensation. The procedure is illustrated in this case. The petitioner, first in a letter from the claims' examiner, and later in a personal interview at the Commission Office, was fully apprised of his rights and of the choice which he was entitled to make.

Once the injured employee makes a binding election to take compensation, whether by acceptance of compensation under the original provisions or by acceptance of compensation under an award pursuant to the amendment, his election operates as an assignment of his cause of action to his employer, and it has been uniformly held that the assignment is absolute. (*Doleman* v. *Levine*, 295 U. S. 221; *Aetna L. Ins. Co.* v. *Moses*, 287 U. S. 530; *Christiansen* v. *United States*, 194 F 2d 978; *Moore* v. *Hechinger*, 127 F 2d 746; *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F 2d 847; *Hunt* v. *Bank Line*, 35 F 2d 136.) By the specific provisions of the statute the assignment gives to the employer the right to institute proceedings or to compromise without proceedings. Discussing all the provisions with reference to the assignment, the opinion in *Hunt* v. *Bank Lines, supra*, stated:

> "When all of these sections are considered together, it is clear that the intention of the act is to require the employee who claims to have been injured by the negligence of a third person to elect whether he will accept compensation under the act or proceed against such third person. If he elects to receive compensation his cause of action is transferred to his employer and he has no other or further interest therein, unless the employer recovers more than enough to reimburse him for the compensation paid, with costs and expenses in which event the excess belongs to the employee. * * * He can elect which course he will follow, but he cannot follow both. * * * It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering

more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises, and this is given by the statute to the employee, not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

In the States whose compensation acts most closely resemble the Federal Act, the same interpretation has been given to the assignment provisions. (*Whalen* v. *Athod Mfg. Co.*, 242 Mass. 547; *Skakandy* v. *State of New York*, 274 App. Div. 153.) In *Skakandy* v. *State of New York*, *supra*, the opinion expresses the same view of the assignment as did the opinion in *Hunt* v. *Bank Line*:

"The assignment resulting by operation of Section 29 aforesaid, is an absolute one. (*Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273; *Travelers Ins. Co.* v. *Padula Co., Inc.*, 224 N. Y. 397). Such assignment divests the next of kin, who are also dependents and who accept compensation, of their rights and privileges under the Decedent's Estate Law and vests in the carrier assignee the ownership of the claim. (*Carter* v. *Brooklyn Ladder Co., Inc.* 265 App. Div. 39; *Calagna* v. *Sheppard Pollak, Inc.*, 264 App. Div. 589, 593.) It carries with it the right to conduct litigation (*Grossman* v. *Consolidated Edison Co.*, 294 N. Y. 39, 44) and to "sue or compromise at will." (*Matter of Zirpola* v. *T. & E. Casselman, Inc.*, 237 N. Y. 367, 375.) The language of the statute is plain, contains no exceptions or limitations and is fully operative and binding even when the assignee has by previous agreement disabled itself from taking advantage of the cause of action. (*Taylor* v. *New York Central RR. Co.* 294, N. Y., 397.) The statutory assignment having become operative, the carrier was under no duty to prosecute against the third party,

> and had full authority to compromise and settle, even for a lesser amount than it had paid by way of compensation. (*Corsi* v. *Jenkins*, 66 N. Y. S. 2d 98.) The conclusion therefore seems inescapable that the statutory assignment carries with it, in the absence of fraud, the right to compromise or otherwise dispose of the claim at any stage of the proceedings, for such sum as the assignee may deem proper and sufficient."

This interpretation of the nature of the statutory assignment by the courts must certainly have been known to the Congress when it had before it consideration of the amendments to Section 933 in 1938. The fact that no change was made with respect to the effect of the assignment at that time would seem to indicate that Congress was satisfied that the interpretation given by the courts expressed the legislative intent. Under similar circumstances the New York Legislature did amend the provisions of its Compensation Act to provide that the injured workman could take compensation and prosecute his action at the same time.

A statement made by Judge Learned Hand in his opinion in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F 2d 46, has again agitated the question and prompted the contention that the injured employee does retain some control over the cause of action even before a recovery is had. Judge Hand said:

> "The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not in doing so, entirely disregard the employee's interest. Certainly, he may not in advance release the whole claim upon consideration that he shall be personally released from his liability for workmen's compensation."

Taken out of context the dictum that the assignee is a trustee of the cause of action for the benefit of the injured

workmen is contrary to the express provisions of the statute and contrary to the established interpretation of the courts. In its context, however, it was a perfectly valid statement since it is quite obvious that the assignee is a trustee to the extent that he cannot seek to avoid his responsibility for compensation payments through the medium of the assignment. And it is clear from the context of the whole opinion that that is as far as Judge Hand intended it to go. The interest of the injured workmen does not arise, and the trustee relationship is not established, until a recovery is had in excess of the amount necessary to reimburse the assignee. The excess is held by the assignee for the benefit of the injured workmen and the apparent reason for that, as pointed out in *Hunt* v. *Bank Line, supra,* is not that the employee "is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

That is not to say that if the injured employee could show fraud or bad faith on the part of the assignee to his damage he would have no right to redress. But that would be in an action against the assignee, not in an action against the negligent third-party.

The contention made by the petitioner here seems to be based on the assumption that the mere fact that the same insurance company insures the employer for compensation and the negligent third-party for liability compels an inference of fraud or bad faith. There is no warranty for any such assumption. The very facts of the case negative any inference of fraud or bad faith. The injuries received by this petitioner, which are set forth in the compensation award, and which were known to the insurance carrier, were negligible. The total compensation paid amounted to $160.72. There is nothing in the record to indicate, and there is no proof, that the injured employee at any time notified his employer that he had suffered

other or more serious injuries. Under those circumstances, and even if it were conceded that the employer was a trustee of the cause of action, there could be no presumption of bad faith on the part of the employer in not prosecuting an action to recover for such insignificant injuries. The powers given by the statute to the assignee include the power to institute proceedings or not as it sees fit. If the petitioner claims that a fraud was perpetrated on him he has his remedy, but that remedy does not include a direct action by him against a negligent third-party in entire disregard of the statutory assignment.

The petitioner here seeks to create the impression that the compensation award was inadequate. He does not explain why the injuries which he now claims to have resulted from his accident were not established before the Compensation Commission where they could have been adequately compensated. If they arose out of his accident, he had full opportunity of establishing that fact before the Compensation Commission; if they did not, then they could not be established in a common law action for negligence. In any event he can scarcely complain that the assignee of his cause of action, knowing only of the insignificant injuries which were established before the Compensation Commission, chose not to incur the expense of litigation.

It is difficult to understand just what right the petitioner seeks to establish here with respect to the assigned cause of action. He cannot establish that he has a right to compel the assignee to institute proceedings since the statute permits the assignee to compromise without the institution of proceedings; he cannot interfere in the settlement of the action since the statute gives the right to the assignee to settle if it sees fit. His remedy would seem to be confined to that allowed him by law in the event that he can prove fraud, and that has been the uniform interpretation of the Act by the Courts.